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THE

LAW OF EVIDENCE

IN CIVIL CASES

BY

BURR W. JONES

OF THE WISCONSIN BAR

LECTURER ON THE LAW OF EVIDENCE AND OTHER SUBJECTS
IN THE LAW SCHOOL OF THE UNIVERSITY OF WISCONSIN

IN THREE VOLUMES

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TO MY MOTHER

**I DEDICATE THIS
WORK**

IN LOVE AND GRATITUDE.

PREFACE.

[IN the preparation of this work my primary object has been to furnish a convenient text-book for trial lawyers, stating tersely the rules of law which govern in the trial of civil cases.

Since the rules of evidence are for the most part the outgrowth of judicial decisions, and belong to the domain of judge-made law, and not to that of codes and statutes, it is not remarkable that, in a country having many independent jurisdictions, there should have arisen in the course of more than a century innumerable conflicting decisions on the law of evidence.

It would be a vain attempt in any treatise, however extended, to reconcile these controversies, and, within the limits of such a work as this, it would even be impossible to discuss at length the conflicting views. In dealing

PREFACE.

with these questions I have sought to state the respective claims, indicating the rules supported by the weight of authority, and have cited the leading authorities supporting each view.

From the earliest English reports to the present time quite a large proportion of the reported decisions in England and in America have contained, in connection with discussions of other subjects, rulings upon questions of evidence. It would not be practicable in a work of this character to cite exhaustively from this multitude of cases. It is in view of this fact that I have referred the practitioner and student to other sources where a fuller presentation of controverted questions may be found. The elementary works are of course well known to the profession, and it has not been deemed necessary to constantly refer to those treatises.

It is well known that some of the ablest discussions of mooted questions of law are to be found in the law reviews and journals and in the various series of annotated cases which have lately come into extensive use. In this

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part of the literature of the law there will often be found a more elaborate review of particular subjects in the law of evidence and a more extended collection of the authorities than in the elementary works or judicial decisions. I have therefore taken pains to cite quite fully these articles and discussions, and, although they have not the authority of judicial decisions, they are often invaluable in the investigation of legal questions.

In treating the various subjects I have not only stated the rules of evidence which govern, but have often given many illustrations from the reported cases. If it may seem that more of these examples are given than are necessary to illustrate the principles involved, the explanation is, that the work has been prepared as an aid to the busy lawyer who is always glad to rest his case upon sound principles of the law and at the same time to fortify it by precedent.

BURR W. JONES.

MADISON, WIS., AUGUST, 1896.

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EVIDENCE.

CHAPTER 1.

EVIDENCE IN GENERAL.

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§ 1. **Evidence — Necessity for exclusionary rules.**—Evidence in its broadest sense has been defined as “any matter of fact, the effect, tendency or design of which is to produce in the mind a persuasion affirmative or disaffirmative of the existence of some other matter of fact.”¹ But it is very evident that the term as used in municipal law must have a very much more limited meaning. However desirable it might be in legal controversies involving the rights of property or the liberty of the citizen, if every fact which might have the slightest bearing on the issue

could be adduced, it is manifest that the limitations which surround judicial tribunals render this impossible. Courts are so organized that there must be some limit to the facts which may be given in evidence, as there must be an end of litigation. By way of illustration, if it is claimed that A has assaulted B there are many classes of facts which would influence the judgment of persons investigating the controversy, which would not be received in courts of justice. The general estimation in which the parties are held in the community, the opinions and comments of neighbors as to the merits of the controversy, the fact that one of the parties has frequently been engaged in similar troubles, would all be matters which might have considerable weight in extra-judicial investigation. But if testimony of this character were to be uniformly admitted in actions for assault, or in other controversies, the expenses and delays of the litigation would be so oppressive that parties might better submit to wrong in silence, or to an unjust judgment, than incur the outlay and hazards of a lawsuit. It is true the reformers have zealously attacked and have broken down many of those artificial barriers which formerly prevented suitors from bringing the facts on which they relied to the ear of the court or jury; but it is hardly possible that the courts of civilized countries will ever seek to administer justice

without the use of fixed, and to some extent arbitrary, rules of evidence. Considering those infirmities in judicial procedure, which must always be borne in mind, it is the lesser evil that there should be an occasional failure of justice, than that litigation should be so expensive as to be only the luxury of the rich, or so protracted as to outlive those who may be compelled to become litigants. Mr. Stephen justly says that "the great bulk of the law of evidence consists of negative rules declaring what, as the expression runs, is not evidence."² These exclusive rules excite surprise among laymen for the reason that by their operation facts which seem to have a probative effect are often rejected, and the question is thus raised whether the ends of justice are not thwarted by defects in judicial procedure. It is clear, however, that the many rules which in our courts of justice govern the introduction of facts for the discovery of the truth, are very closely associated with an institution very dear to the Anglo-Saxon race, that of trial by jury. In a celebrated case Lord Mansfield called attention to the fact that, "In Scotland and most of the Continental states, the judges determine upon the facts in dispute as well as upon the law and they think there is no danger in their listening to evidence of hearsay because, when they come to consider of their judgment on the merits of the case, they can

trust themselves entirely to disregard the hearsay evidence, or to give it any little weight which it may seem to deserve. But in England, where the jury are the sole judges of fact, hearsay evidence is properly excluded, because no man can tell what effect it might have upon their minds." 3

1, Bentham Jud. Ev. p. 17.

2, Introduction to Steph. Ev.

3, Berkeley's Peer Case, 4 Camp. 414; Thayer Cas. Ev., p. 4.

§ 2. Evidence—Definitions of, as used in municipal law.—The more limited meaning of the term evidence, as used in legal proceedings, is well illustrated in the definition of Mr. Stephen, according to which evidence includes, (1) statements made by witnesses in court under a legal sanction in relation to matters of fact under inquiry, and (2) documents produced for the inspection of the court or judge.¹ Perhaps this definition is open to the criticism that it does not include those facts which in judicial proceedings may be addressed directly to the senses of the court or jury; for example, when the blood-stained clothing of the deceased is shown to the jury in a case of homicide, or when the tools found upon the person of a burglar are exhibited in court, evidence is adduced, and yet it consists neither

of oral nor of written statements.² Other definitions which have met with favor are the following: Says Professor Greenleaf: "Evidence in legal acceptation includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved."³ According to codes of procedure adopted in several states: "Judicial evidence is the means, sanctioned by law, of ascertaining in a judicial proceeding the truth respecting a question of fact."⁴ According to Professor Thayer: "Evidence is any matter of fact which is furnished to a legal tribunal, otherwise than by reasoning or a reference to what is noticed without proof, as the basis of inference in ascertaining some other matter of fact." And the law of evidence is the law which has to do with the furnishing of this matter of fact: "(1) It prescribes the manner of presenting evidence; as by requiring that it shall be given in open court by one who personally knows the thing to be true, appearing in person, subject to cross-examination; or by allowing it to be given by deposition, taken in such and such a way; and the like; (2) it fixes the qualifications and the privileges of witnesses, and the mode of examining them; (3) and chiefly, it determines, as among probative matters, things which are logically and in their nature evidential, what classes of things shall not be received. This ex-

cludign function is the characteristic one in our law of evidence." 5

1, Steph. Ev. art. 1.

2, See chapter on real evidence, *infra*.

3, 1 Greenl. Ev. sec. 1. This definition has been criticised for including not only facts but arguments, see Chamberlayne's Best Ev. sec. 11.

4, Cal. Code, sec. 1823; Mont. Ann. Code, sec. 3100; Hill's Ann. Laws (Ore.), sec. 665.

5, Thayer Cas. Ev. p. 2.

§ 3. The terms evidence and proof.—The attempt has frequently been made, but without great success, to distinguish between the terms *Evidence and Proof*. The latter term in its popular meaning more often refers to the degree or kind of evidence which will produce full conviction, or establish the proposition to the satisfaction of the tribunal. More accurately, proof is the effect or result of evidence while evidence is the medium of proof.¹ To more fully illustrate the meaning of the two terms, if on a charge of arson it were shown that the accused had obtained excessive insurance upon the property burned, that he was in embarrassed circumstances, that he had made contradictory statements as to the circumstances of the fire, and had betrayed great emotion on his arrest, any one of these circumstances might constitute *evidence* tending to show his guilt; but all combined might or might not be deemed *proof* thereof.

It will be found, however, that the two terms are frequently used in text-books and in judicial decisions as synonymous. They are often used in such manner as to include at one time the media by which the facts are established, at another the effect or conclusions produced by the testimony.

1, Best Ev. sec. 10 *et seq.*

§ 4. **Demonstrative and moral evidence.**—In judicial procedure the issues are so framed that it is hardly possible to establish with absolute certainty the truth of the propositions involved; hence in courts of justice parties are compelled to rely not upon *demonstrative* but upon *moral evidence*, "by which is meant not only that kind of evidence which is employed on subjects connected with moral conduct, but all the evidence which is not obtained either from intuition or from demonstration."¹ It is elementary that in civil cases a mere preponderance of the proof is all that is necessary to establish the point in issue; while, in criminal actions it is necessary to prove the guilt of the accused beyond a reasonable doubt. But even this degree of proof is often far removed from a demonstration of guilt. By the phrase "proof to a moral certainty" or "beyond a reasonable doubt" such proof only is meant as satisfies the judgment and consciences of the jury, as reasonable men, that the crime

charged has been committed by the defendant, and so satisfies them as to leave no other reasonable conclusion possible.²

1, Greenl. Ev. sec. 1.

2, Com. v. Costley, 118 Mass. 1; Com. v. Webster, 5 Cush. 295; Com. v. Cobb, 14 Gray 57; Com. v. Tuttle, 12 Cush. 502; Regina v. White, 4 Fost. & F. 383.

§ 5. **Direct and circumstantial evidence.**—Other terms which are familiarly used to designate different forms of evidence are *direct* and *circumstantial*. Direct or positive evidence is evidence to the precise point in issue; as in case of homicide, that the witness saw the accused inflict the blow which caused the death, or, in a prosecution for arson, that the witness saw the defendant apply the torch which lighted the fire, or in the case of an agreement, that the witness was present and witnessed it.¹ *Circumstantial Evidence* is that which relates to a series of other facts than the fact in issue, which by experience have been found so associated with that fact that in the relation of cause and effect they lead to a satisfactory conclusion; for example, when foot-prints are discovered after a recent snow, it is proper to infer that some animated being passed over the snow since it fell; and from the form and number of the foot-prints it can be determined whether they are those of a man, a bird or a quadruped. Such evidence, therefore, is founded on expe-

rience and observed facts and coincidences establishing a connection between the known and proven facts and the facts sought to be proved.² These two kinds of evidence are thus defined by the codes in several states: "Direct evidence is that which proves the fact in dispute directly without any inference or presumption and which, if itself is true, conclusively establishes the fact. . . . Indirect evidence is that which tends to establish the fact in dispute by proving another, and which though true does not of itself conclusively establish that fact, but which affords an inference or presumption of its existence."³

1, Com. v. Webster, 5 Cush. 295.

2, Com. v. Webster, 5 Cush. 295; Pitts v. State, 43 Miss. 472; State v. Phipps, 39 Cal. 326. For a comparison between direct and circumstantial evidence, see State v. Coleman, 22 La. An. 455; State v. Van Winkle, 6 Nev. 340; Stark. Ev. 839. For discussions as to weight of such evidence, see note to Rippey v. Miller, 1 Jones (N. C.) 479; 62 Am. Dec. 179-188.

3, Cal. Code, secs. 1831, 1832; Hill's Ann. Laws (Ore.), secs. 672, 673; Mont. Ann. Code, secs. 3108, 3109.

§ 6. Competent and satisfactory evidence.—Another distinction constantly recognized by the courts is that between *competent* and *satisfactory* evidence, and is thus stated and explained by Professor Greenleaf: "By *competent evidence* is meant that which the very nature of the thing to

be proved requires, as the fit and appropriate proof in the particular case, such as the production of a writing, where its contents are the subject of inquiry. By *satisfactory evidence*, which is sometimes called *sufficient evidence*, is intended that amount of proof which ordinarily satisfies an unprejudiced mind beyond reasonable doubt. The circumstances which will amount to this degree of proof can never be previously defined; the only legal test of which they are susceptible is their sufficiency to satisfy the mind and conscience of a common man; and so to convince him that he would venture to act upon that conviction, in matters of the highest concern and importance to his own interest. Questions respecting the competency and admissibility of evidence are entirely distinct from those which respect its sufficiency or effect; the former being exclusively within the province of the court; the latter belonging exclusively to the jury."¹ In determining whether evidence is competent, reference must be had to those excluding principles which form so large a part of the law of evidence, and it is clear that the application of those rules of law which restrain the admission of evidence can be safely entrusted only to those familiar with legal science. Although the sufficiency of the evidence is ordinarily for the determination of the jury, it will be seen that in determining the *amount* of tes-

timony to be received and the mode of its presentation, the court is charged with important functions, and vested with no little discretion.²

1, 1 Greenl. Ev. sec. 2.

2, See secs. 171, 172 *infra*, and sections on examination of witnesses.

§ 7. Other descriptive terms.— *Cumulative* evidence, is additional evidence of the same kind to the same point. Thus when testimony has been given by one or more witnesses as to an assault, and other witnesses are produced who testify to the same state of facts and to no new fact, the evidence given by such witnesses is merely cumulative.¹ Although cumulative evidence is admissible, and often of great importance, considerable discretion may be exercised by the trial judge in determining the extent to which such evidence may be received, and in limiting the number of witnesses who may testify to a particular fact.² There are numerous terms which are frequently used as descriptive of different kinds of evidence which will be frequently referred to in this work or discussed under separate heads. For example, *real evidence* is that which is addressed to the senses of the tribunal, as where objects are presented for the inspection of the jury.³ *Primary or best evidence* is that which affords the greatest certainty of the fact in question;

thus a deed or other written instrument is primary evidence of its contents.⁴ *Secondary evidence* is that which is inferior to primary evidence, and which upon its face shows that better evidence exists; thus a copy of a written instrument or the recollection of a witness as to its contents.⁵ When evidence is received which the law does not allow to be contradicted, it is said to be *conclusive*. Thus the record of a court of competent jurisdiction cannot be contradicted by the parties to such record.⁶ *Prima facie* evidence is that which standing alone, unexplained or uncontradicted, is sufficient to maintain the proposition affirmed.⁷ Thus by statutes, account books complying with the requisite formalities, are *prima facie* evidence of the sale and delivery of goods,⁸ and records and certified copies made by public officers may be *prima facie* evidence of the contents of the original documents.⁹

1, Parker v. Hardy, 24 Pick. 246; People v. Superior Court, 10 Wend. 285, and cases cited.

2, Thomp. Trials, sec 353; Mergentheim v. State, 107 Ind. 567; Hilliard v. Beattie, 59 N. H. 462; Bays v. Hunt, 60 Iowa. 251; Union Railway Co. v. Moore, 80 Ind. 458; Everett v. Union Pacific Railway Co., 59 Ia. 243. See sec. 902 *infra*, and chapter on examination of witnesses.

3, For discussion of this subject see chapter on real evidence.

4, See secs. 194 *et seq. infra*.

5, See secs. 197 *et seq. infra*.

6, See secs. 601 *et seq. infra*.

7, Kelly v. Jackson, 6 Pet. 632; Lilienthal's Tobacco v. United States, 97 U. S. 268; Emmons v. Westfield Bank, 97 Mass. 243; Cal. Code Civ. Pro. sec. 1833; 70 Cal. 570.

8, For statutory definitions of the various classes of evidence see Cal. Code Civ. Pro. sec. 1825. As to account books see sec. 582 *et seq.*

7, See secs. 537, 557 *infra.*

CHAPTER 2.

PRESUMPTIONS.

- § 8. Presumptions — In general.
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- § 10. Presumptions of law — Conclusive and disputable.
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- § 34. Same — Collateral and direct proceedings — Awards of arbitrators.
- § 35. Regularity of official acts.
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- § 47. Same subject — Telegrams — Weight of the presumption.
- § 48. Presumptions arising from partnership dealings.
- § 49. Presumptions of regularity in acts of private corporations.
- § 50. Same subject — General scope of the rule.
- § 51. Miscellaneous presumptions from the general course of business.

§ 8. Presumptions — In general.—"A presumption may be defined to be an inference as to the existence of one fact from

the existence of some other fact founded upon a previous experience of their connection." ¹ The whole history of jurisprudence illustrates the fact that among judges as among legislators, there is a constant struggle, however ineffectual it may be, to approach uniformity in the law. Although every judge understands that each case should be determined according to its own facts, he often finds different cases so nearly analagous in the facts presented that similar instructions to the jury are appropriate in each. Judges thus find themselves not only applying to different cases the same substantive rules of law, but they derive aid from precedents even in reaching conclusions as to the facts of a given cause. To illustrate the growth of presumptions of law: There were probably instances in the history of the common law where children under seven years of age were convicted of criminal offenses. ² Judges, however, acting upon their knowledge of the incapacity of children of very tender age to form a criminal intent, undoubtedly very early instructed juries to act with caution in such cases; and later the rule was established without the aid of any statute and purely by way of judicial legislation that a child under seven years of age could not commit a felony. ³ In like manner the judges gradually developed the rule independently of statutes that if seven years elapse after a traveler has crossed the high

seas without being heard from, the presumption arises that he is dead.* As another illustration of judge-made law the courts slowly adopted the practice of instructing juries that from the long enjoyment of an incorporeal hereditament they might draw the inference of right to such enjoyment in the possessor.* These and other illustrations which will be discussed under the appropriate heads exemplify the manner in which the courts have gradually deduced canons of evidence for inferring the existence of one fact from other facts which are proved and which generally accompany the fact so to be inferred. Out of these attempts of many judges to deduce rules for determining the probative effect of certain facts or groups of facts often recurring have developed many rules called presumptions, but which widely differ in importance and intensity. As we go on it will be seen that some of these presumptions play quite as important a part in the administration of justice as those parts of the municipal law which are embodied in statutes; they are of such importance that, if disregarded by a jury, the verdict will be set aside. On the other hand there are other presumptions so called which scarcely ought to be dignified by the name, but which have been long recognized as such in the courts, and have some value in aiding the court or jury to draw the proper inferences from facts established. Although

more elaborate classifications of the different presumptions have sometimes been made, the one which is most satisfactory and leads to the least confusion is that of *Presumptions of Fact* and *Presumptions of Law*. Authors have sometimes added a third class called *Mixed Presumptions*, meaning those partaking of the nature of both of the other classes; but the distinctions in this classification are so uncertain and refined as to be of little practical value.*

1, Stark. Ev. p. 742. On the general subject of presumptions, see a valuable article by the learned author, Prof. James B. Thayer, 3 Harv. L. Rev. 141; reprinted in Thayer Cas. Ev. Also article in 6 L. Mag. 348, and 1 Jour. Jur. 337.

2, 1 Russ. Cr. 2.

3, *Infra*, sec. 97.

4, *Infra*, sec. 57.

5, *Infra*, sec. 72 *et seq.*

6, See the fanciful classification of Coke cited in Best Ev. sec. 317.

¶ **9. Presumptions of fact.**—It has been said that presumptions of fact can hardly be classed with propriety as belonging to this branch of the law. Says Professor Greenleaf: "They are in truth but mere arguments, of which the major premise is not a rule of law; they belong equally to any and every subject matter; and are to be judged by the common and received tests of the truth of propositions

and the validity of arguments. They depend upon their own natural force and efficacy in generating belief or conviction in the mind, as derived from those connections, which are shown by experience, irrespective of any legal relations. They differ from presumptions of law in this essential respect, that while those are reduced to fixed rules, and constitute a branch of the particular system of jurisprudence to which they belong, these merely natural presumptions are derived wholly and directly from the circumstances of the particular case, by means of the common experience of mankind, without the aid or control of any rules of law whatever. Such, for example, is the inference of guilt, drawn from the discovery of a broken knife in the pocket of the prisoner, the other part of the blade being found sticking in the window of a house, which, by means of such an instrument had been burglariously entered." ¹ These are sometimes called *natural* presumptions since they are supposed to correspond with those inferences which the reasoning process would ordinarily deduce from a given state of facts and do not depend upon those artificial rules which precedent has developed into law. Among the illustrations which have been given of presumptions of fact are the following: The presumption of guilt derived from foot-marks resembling those of a particular person being found on the snow or

ground near the scene of crime. The presumption of homicide from previous quarrels or from the accused having a pecuniary interest in the death of the deceased.² The most familiar illustration and the one most cited is that derived from the scriptures in which Solomon determined that the pretended mother was not the real mother of the child she was willing to have divided in twain.³ Other illustrations are thus given by Mr. Starkie: "Presumptions, and strong ones, are constantly founded on a knowledge of mankind; a man's motives are inferred from his acts, and his conduct from the motives by which he was known to be influenced; it is presumed, that a rational agent intended the consequence which his acts naturally tended to accomplish; that he consults his own interests; that if he pays or acknowledges a debt it is really due; that if he admits himself to be guilty of a crime the admission is true; that he does not commit a crime, or do any other act which tends to his prejudice, without a motive. Presumptions of this nature, in almost every case of circumstantial evidence, afford a light which may be considered to be absolutely essential to the discovery of truth; but then they operate simply by their own intrinsic efficacy as ascertained by experience, and never so conclusively as to form the basis of an artificial rule which is to operate invariably."⁴

It is evident, however, that many of the instances commonly cited as examples of presumptions of fact are mere illustrations of circumstantial evidence. They are inferences drawn by the ordinary reasoning powers and without the aid of any artificial rules of law; inferences which, however well founded under some circumstances, are entirely unjustifiable under others, and which from the infinite complexity of human affairs are too uncertain and unreliable to be urged upon juries except in an advisory manner.

1, 1 Greenl. Ev. sec. 44.

2, Best Ev. sec. 319.

3, Kings, ch. 3.

4, Stark. Ev. (9th Am. ed.) p. 744.

§ 10. Presumptions of law—Conclusive and disputable.—When an inference derives from the law some arbitrary or artificial effect and is obligatory upon judges and juries, that inference is a *presumption of law*. It arises when the facts found are in point of law inconsistent with any supposition except that of the existence or non-existence of the fact in controversy, in which case the conclusion is necessary, independently of any belief based upon what is more or less probable, because the law declares the uniform effect of such a state and condition of circumstances.¹ Presumptions of law are gen-

erally divided into two classes, *conclusive* and *disputable*. "*Conclusive or absolute presumptions of law* are rules determining the quantity of evidence requisite for the support of any averment which is not permitted to be overcome by any proof that the fact is otherwise."² In the earlier treatises on the law of evidence various presumptions were treated under this head which are no longer so classified. It will be seen as the discussion proceeds that courts are inclined to abandon the arbitrary rules of evidence which formerly forbade inquiry into the real facts. Instruments under seal were once regarded as conclusive evidence of a consideration, unless the instrument was impeached for fraud,³ receipts under seal were conclusively presumed to import the payment of money.⁴ But few of the numerous presumptions formerly called conclusive can now be so classified. At common law infants under seven are presumed to be incapable of committing crime; a boy under fourteen is conclusively presumed incapable of committing a rape; a female of tender age is conclusively presumed incapable of consenting to sexual intercourse, this age, not having been precisely determined in the common law, was fixed by statute in the reign of Queen Elizabeth at ten years.⁵ So the issue of a wife cohabiting with her husband who is not impotent is indisputably presumed to be legitimate.⁶ In the absence of

statutory regulations there may be still cited as illustrations of conclusive presumptions of law the presumptions that persons know the law by which they are governed, and that sane persons know the consequences of their acts. Yet it may well be urged that all of these so-called conclusive presumptions may be more properly described as substantive rules of the law than as conclusive presumptions of law. The same remark applies to most of the statutes of limitations, which are sometimes regarded as creating conclusive presumptions. Whether or not these presumptions are to hold their place as conclusive it is evident that by far the greater number of legal presumptions belong to the class known as *disputable* presumptions; or those presumptions which arise and continue until they are overcome by evidence, or by some stronger presumption. The presumption of innocence, of legitimacy and indeed most of those discussed in the following pages are illustrations of this class.

- 1, *Sun Mut. Ins. Co. v. Ocean Ins. Co.*, 107 U. S. 485.
- 2, 1 *Greenl. Ev.* sec. 44.
- 3, *Best Ev.* sec. 220.
- 4, *Best Ev.* sec. 406.
- 5, 1 *Bish. Cr. L.* ch. 26, secs. 461, 466; *Best Ev.* sec. 438;
- 4 *Bl. Comm.* 212; 3 *Greenl. Ev.* sec. 211.
- 6, *Infra*, sec. 94.

§ 11. **Presumption of innocence.**—Perhaps there is no presumption more highly

avored in the law than that of innocence. The maxims, "*Injuria non praesumitur*," and "*Odiosa non praesumuntur*," have been recognized in criminal trials under the common law for hundreds of years.¹ At a time when persons could not have the aid of counsel and could not even testify in their own behalf, the presumption involved in these ancient maxims was one of the few beneficent rules in a harsh criminal code. Although some of the reasons which led to the adoption of this presumption have disappeared with the severity of the old criminal law, yet the sacredness of reputation and liberty still gives sanction to the rule that the law presumes in favor of innocence. The favor with which this presumption is regarded in the law is illustrated in this, that when misconduct or crime is alleged, whether in a criminal or in a civil suit, whether in a direct proceeding to punish the offender or in some collateral manner, the accused is presumed to be innocent until proved guilty.² This is also illustrated in the fact that other presumptions so often have to yield to that of innocence,³ and by the fact that although ordinarily the burden of proof is on the one asserting the affirmative of the issue, yet if proof of a negative is necessary to establish guilt, such proof must be made.⁴ This presumption has its most frequent application in the criminal law; indeed, it has sometimes been said to have no place in

civil cases except so far as it regulates the burden of proof.⁶ But it is held by the general weight of authority, as will be seen from the illustrations given below, that the presumption rests on a broader basis. As stated by Mr. Taylor: "The right which every man has to his character, the value of that character to himself and his family and the evil consequences which would result to society if charges of guilt were lightly entertained, or readily established in courts of justice — these are the real considerations which have led to the adoption of the rule that all imputations of crime must be strictly proved. The rule, then, is recognized alike by all tribunals, whether civil or criminal, and is equally effective in all proceedings, whether the question of guilt be directly or incidentally raised." ⁶

1, Coke Litt. 232. For comparison as to the practice in the civil and the common law see article, 14 Crim. L. Mag. 184.

2, Ross v. Hunter, 4 T. R. 33; Best Ev. sec. 346.

3, See conflicting presumptions, sec. 100 *et seq.*

4, Williams v. East India Co., 3 East 192; *infra*, sec. 186.

5, Whart. Ev. sec. 1245; Lilienthal's Tobacco v. United States, 97 U. S. 237. For discussion of limitations of the rule in habeas corpus cases see note, 22 L. R. A. 678.

6, Tayl. Ev. sec. 112.

§ 12. Same — Applications of the presumption — Fraud and similar issues. — This presumption is of constant application in

civil actions when fraud is the issue. "*Fraus est odiosa et non praesumenda.*" In the ordinary transactions of life fairness and honesty are presumed and conveyances, sales and contracts generally are presumed to have been made in good faith until the contrary appears.¹ But from this it is not to be understood that fraud can not be inferred from circumstantial evidence, as it is by evidence of this character that the charge must be often, and indeed generally is, established.² The party alleging fraud, deceit or fraudulent representations must produce stronger proof than would suffice to establish a mere debt or sale; it is incumbent on him to furnish sufficient proof to overcome the presumption of innocence and honesty. In actions involving fraud, as in other cases where the facts present a double aspect, one consistent with fair dealing and the other involving dishonesty of purpose, the court, unless the scale decidedly predominates for the latter, will strike the balance in favor of honesty and innocence.³ So *administrators and trustees* are presumed to have performed their duty⁴ and not to have committed breaches of trust.⁵ In partnership contracts illegality will not be presumed. Thus where there is an agreement to deal in cotton futures, the arrangement will be presumed to be lawful rather than a gaming contract.⁶ It is on the same principle that, when there is an interlineation or alteration of a

written instrument, not suspicious on its face, it is presumed, if unexplained, to have been made before execution.⁷ And when one claims title to land by a deed to him purporting to be made for a valuable consideration, he is presumed to be a purchaser in good faith without notice of prior unrecorded deeds until the contrary is shown.⁸ So witnesses are presumed to have testified truthfully.⁹ When professional services have been rendered, it is to be presumed that they have been necessarily and not improperly rendered.¹⁰ It will not be presumed that acts have been done for which the law imposes a penalty¹¹ or that the law has been violated¹² or will be violated.¹³ And "where a person is required to do an act, the omission to do which would be criminal, his performance of that act will be intended until the contrary is shown."¹⁴

1, 1 Kerr Frauds (2d ed.) 448; *Gregg v. Sayre*, 8 Peters 244; *O'Neill v. Boone*, 82 Ill. 589; *Stewart v. Preston*, 1 Fla. 10; 44 Am. Dec. 621; *Williams v. Lord*, 75 Va. 390; *Patee v. Pelton*, 48 Vt. 182; *Price v. Grover*, 40 Md. 102; *Hatch v. Bayley*, 12 Cush. 27. Public officers are presumed to do their duty, see *United States v. Jones*, 31 Fed. Rep. 718. One is presumed not to be selling liquor without license, *Timson v. Moulton*, 3 Cush. 269. It is presumed that a marriage was duly solemnized, *Sichel v. Lambert*, 15 C. B. N. S. 781. It is also presumed that every person has conformed to the laws until contrary appears, *King v. Hawkins*, 10 East 211. The court will not presume that liquor is sold in a tavern though licensed to sell, *Savier v. Chipman*, 1 Mich. 116. Where one is shown to be a wrongdoer as to one transaction he will not be presumed guilty of other contemporaneous acts, *Harris v. Rosenberger*, 43 Conn. 227. It is presumed that

a servant is honest in turning over to his master money received, *Evans v. Birch*, 3 Camp. 10.

2, *Kaine v. Weigley*, 22 Pa. St. 179; *Reed v. Noxon*, 48 Ill. 323; *O'Donnell v. Legar*, 25 Mich. 367; *Lowery v. Beckner*, 5 B. Mon. 41; *Morford v. Peck*, 46 Conn. 380. See full discussion of this subject, and many cases cited in *Burch v. Smith*, 15 Tex. 219; 65 Am. Dec. 154 and note.

3, *Hatch v. Bayley*, 12 Cush. 27; *Price v. Gover*, 40 Md. 102; *Greenwood v. Lowe*, 7 La. An. 197; *Oaks v. Harrison*, 24 Iowa 179; *Leighton v. Orr*, 44 Iowa 680. The conduct of third persons whose acts are investigated only collaterally, will also be presumed free from fraud, *Ross v. Hunter*, 4 T. R. 33.

4, *Gee v. Hicks*, Rich. (S. C.) Eq. Cas. 5. For discussion of presumptions and burden of proof where fiduciary relations exist see *infra*, sec. 188.

5, *Brewster v. Striker*, 2 N. Y. 19.

6, *Williams v. Connor*, 14 S. C. 621.

7, See sec. 578 *et seq. infra*.

8, See extended note to *Anthony v. Wheeler*, 17 Am. St. Rep. 288, citing cases.

9, *Hewlett v. Hewlett*, 4 Edw. Ch. (N. Y.) 7; *Matthews v. Lanier*, 33 Ark. 91.

10, *Todd v. Myers*, 40 Cal. 355.

11, *Sidney v. Sidney*, 3 Will. (P.) 270; *Scholes v. Hilton*, 10 M. & W. 15.

12, *Savier v. Chipman*, 1 Mich. 116; *Timson v. Moulton*, 3 Cush. 269; *Hewlitt v. Hewlitt*, 4 Edw. Ch. (N. Y.) 7.

13, *Johnson v. Farwell*, 7 Me. 370.

14, *Stark. Ev.* 756.

§ 13. Same—As applied to the marriage relation.—It is upon the same general principle that when persons live and cohabit together and are reputed to be mar-

ried, they are presumed to be married as it will not be presumed that they have violated the law.¹ And where a husband separated from his wife and cohabited with another woman, it was even presumed in favor of innocence that a divorce had been obtained.² And where a person had married a second time and the issue was whether he had obtained a divorce, it was presumed that the decree had been recorded according to law.³ But there is no absolute presumption of law as to the dissolution of marriage under such circumstances. Each case must be determined upon its own facts and circumstances and such inferences as should be reasonably drawn from them.⁴

1, *Post v. Post*, 70 Ill. 484; *Cope v. Pearce*, 7 Gill. 263. But there is an exception in case of bigamy and where damages are claimed for adultery, *Catherwood v. Caston*, 13 M. & W. 261; *Rex v. Millis*, 10 Cl. & F. 534; *People v. Humphrey*, 7 Johns. 314; *Buchanan v. State*, 55 Ala. 154; *Weinberg v. State*, 25 Wis. 370; *Brown v. State*, 52 Ala. 338; *Com. v. Norcross*, 9 Mass. 492; *Tayl. Ev. sec. 172*. See sec. 85 *et seq. infra*.

2, *Blanchard v. Lambert*, 43 Iowa 228. For other illustrations of presumptions of marriage see *Lawson Pres. Ev. pp. 93, 94*.

3, *In re Edwards*, 58 Iowa 431. For further discussion see presumptions as to marriage, sec. 85 *et seq. infra*.

4, *Williams v. Williams*, 63 Wis. 58, full discussion; *St. Sure v. Lindsfelt*, 82 Wis. 346, as to alleged divorce in a foreign country.

§ 14. Negligence. — On the same principle rests the familiar rule that negligence is

not to be presumed; it is rather to be presumed that ordinary care has been used. And the person charging negligence must show that the other party by his act or omission has violated some duty incumbent upon him and thereby caused the injury complained of.¹ This rule does not apply in the case of *common carriers*, who, on grounds of public policy, are presumed to have been negligent if goods entrusted to their care have been lost or damaged.² And there is another class of cases against carriers where it is often held that negligence may be inferred from the fact that an injury has happened to a passenger. As where a car leaves the track or a stage coach is overturned, or where there is a collision between trains belonging to the same company.³ Although if, in proving the injury, facts and circumstances are developed which tend to exonerate the carrier or to charge the plaintiff with contributory negligence, no presumption of negligence arises.⁴ There is another class of cases in which it is held that where the thing is shown to be under the management of the defendant or his agent and where an *accident* in the ordinary course of events does not happen when the business is properly conducted, the accident itself, if it happens, raises a presumption of negligence in the absence of any explanation. The English case where a passer-by in a street was hurt by a

barrel of flour falling from a warehouse window is an illustration of this group of cases.⁵ The same principle is illustrated by a New York case in which it was held that since the owner of a building adjoining the street is under obligation to take reasonable care that the same shall not fall upon the passers-by, if such an accident happens without any proof of explanatory circumstances, negligence will be presumed.⁶ In such cases the facts are said to speak for themselves, *res ipsa loquitur*. But in all such cases the cause of the accident must be clearly connected with the defendant as being by his act or under his control before negligence can be presumed.⁷

1, The Nitro Glycerine Case, 15 Wall. 524; Weiss v. Pennsylvania Ry. Co., 79 Pa. St. 387; Lynds v. Connecticut Ry. Co., 27 Vt. 643; The Buckeye, 7 Biss. 23; Huey v. Gahlenbeck, 121 Pa. St. 238; 6 Am. St. Rep. 790 and note; 1 Shear. & Redf. Neg. (4th ed.) sec. 57 *et seq.*; Jones Neg. Mun. Corp. sec. 230; Deer. Neg. sec. 405.

2, Ross v. Hill, 2 C. B. 890; Coggs v. Fernard, 2 Ld. Raym. 918; The Nitro Glycerine Case, 15 Wall. 524; Philadelphia Ry. Co. v. Anderson, 72 Md. 519; 20 Am. St. Rep. 483 and long note. Note, 16 L. R. A. 261. *Infra*, sec. 181. Deer. Neg. sec. 121; Lawson Carriers, sec. 245.

3, Flannery v. Railway Co., 11 C. L. 30; Boyce v. California Stage Co., 25 Cal. 460; Skinner v. Railway Co., 5 Exch. 787; Edgerton v. Railway Co., 39 N. Y. 227; Augusta Ry. Co. v. Randall, 79 Ga. 304; Memphis & Ohio Packet Co. v. McCool, 83 Ind. 392; 43 Am. Rep. 71 and note; Smith v. Railway Co., 32 Minn. 1; 50 Am. Rep. 550 and note; Miller v. Ocean Co., 118 N. Y. 199; Feital v. Railway Co., 109 Mass. 398. See note, 20 Am. St. Rep. 490,

above cited for further illustrations and also illustrations and cases in note, 15 L. R. A. 35; Cooley Torts, 660-663.

4, For cases illustrating this subject in case of personal injuries see *Barnonski v. Helson* (Mich.), 15 L. R. A. 33 and long note. See sec. 182, *infra*.

5, *Byrne v. Broadle*, 2 Hurl. & C. 722; *Scott v. London Dock Co.*, 34 L. J. Ex 220; *Kearney v. Railway Co.*, 5 L. R. Q. B. 411; *Memphis & Ohio Packet Co. v. McCool*, 83 Ind. 392; 43 Am. Rep. 71 and note. See note to *Huey v. Gahlenbeck*, 6 Am. St. Rep. 792 and cases; also note to *Philadelphia Ry. Co. v. Anderson*, 20 Am. St. Rep. 483; also note, 15 L. R. A. 34. As to injuries caused by the explosion of a boiler see, *Rose v. Stephens*, 21 Am. L. Reg. 522 and note; also note, 15 L. R. A. 35.

6, *Mullen v. St. John*, 57 N. Y. 567. As to the falling of a brick from a railroad bridge, see leading case, *Kearney v. Railway Co.*, L. R. 5 Q. B. 441.

7, *Smith Neg.* p. 248.

§ 15. Effect of the presumption of innocence as to the amount of evidence.—It has been the subject of much discussion as to what degree of evidence is necessary to repel the presumption of innocence in civil proceedings. It is perfectly well settled that in criminal actions the commission of a crime must be proved beyond a reasonable doubt. But the authorities are in conflict on the point whether the same rule obtains in civil proceedings. Mr. Stephen lays down the English rule very broadly, as follows: "If the commission of a crime is directly in issue in any proceeding, criminal or civil, it must be proved beyond a reasonable doubt."¹ This doctrine has been questioned in Eng-

land, but is there sustained by the weight of authority. On the other hand the decided weight of authority in the United States supports the proposition that in civil actions, although the charge of a crime is to be established, a preponderance of testimony is sufficient. Thus in civil actions on insurance policies,² in actions for slander and libel with justification,³ in trial of the issue of adultery,⁴ in the trial of charges of receiving stolen goods⁵ or of negligence or fraud,⁶ the rule just stated has been maintained. But there are a few authorities in this country which do not concur in this view.⁷

1, Steph. Ev. art. 94. For further discussion of this subject see sec. 193, *infra*.

2, May Ins. sec. 583; *Blaeser v. Milwaukee Ins. Co.*, 37 Wis. 31; 19 Am. Rep. 747; *Schmidt v. Ins. Co.*, 1 Gray 529; *Aetna Ins. Co. v. Johnson*, 11 Bush 587; 21 Am. Rep. 223; *Kane v. Ins. Co.*, 39 N. J. L. 697; 23 Am. Rep. 239. See note on this subject, *Sprague v. Dodge*, 95 Am. Dec. 523-525.

3, *Ellis v. Buzzell*, 60 Me. 209; 11 Am. Rep. 204; *Knowles v. Scribner*, 57 Me. 497; *Matthews v. Huntley*, 9 N. H. 146; *Sloan v. Gilbert*, 12 Bush 51; 23 Am. Rep. 708.

4, *Poertner v. Poertner*, 66 Wis. 644.

5, *United States Ex. Co. v. Jenkins*, 73 Wis. 471.

6, *Seybolt v. N. Y. Ry. Co.*, 95 N. Y. 562; *Gordon v. Parmlee*, 15 Gray 413; *Jones v. Greaves*, 26 Ohio St. 2; 20 Am. Rep. 752.

7, *Schultz v. Ins. Co.*, 14 Fla. 73; *Butman v. Hobbs*, 35 Me. 227; *McConnell v. Ins. Co.*, 18 Ill. 228; *Thurtell v. Beaumont*, 1 Bing. 339. In Illinois a distinction is made

to depend on whether or not the charge of criminality is made *in the pleadings*, *Sprague v. Dodge*, 48 Ill. 142; 95 Am. Dec. 523.

§ 16. Presumption arising from the spoliation or fabrication or suppression of evidence.— Closely allied with the presumption of innocence are the presumptions which arise against persons who fabricate, suppress or destroy testimony. *Omnia praesumuntur contra spoliatores*. By such conduct the presumption of innocence may be repelled and overcome. Such conduct may not only be relevant testimony to rebut the presumption of innocence, but may be treated by the jury as evidence of guilt.¹ The familiar leading case which illustrates the nature of this presumption is that in which the goldsmith wrongfully refused to deliver a valuable jewel which had been left in his possession. The jury were instructed that unless the defendant produced the jewel and thereby showed it to be not of the finest quality, they should find the jewel of the highest value that would fit the socket in which it was placed.² The same rule has been enforced in numerous other cases when a party has by his wilful acts rendered it impossible to show the quality or value of the property sued for. In such cases the inference is irresistible that the facts suppressed would be unfavorable to the wrongdoer and the courts have the right to act on such presumption.³ The wilful sup-

pression, alteration or fabrication of documentary evidence properly gives rise to the presumption that the documents if produced would be injurious to the one who has thus hindered the investigation of the facts.⁴ This rule has been applied in the case of deeds,⁵ of account books,⁶ corporate records,⁷ the vouchers of trustees, agents and partners,⁸ and is far-reaching in its effect. In some cases it has been contended that when the spoliation is once shown it should be assumed that the contents of the documents are what is alleged by the other party.⁹ But it may well be questioned whether the presumption should be carried to this extent. Doubtless the wrongful act is a circumstance from which the jury may draw the most unfavorable inference against the wrongdoer. Such act may throw suspicion on all the other evidence produced by him.¹⁰ And it will prevent him from proving the contents of the documents destroyed by any other evidence.¹¹ But the presumption arising from such acts does not entirely dispense with proof by the adverse party.¹² Parol evidence may be given by him of the contents of the document.¹³ And such evidence, when supported by the presumption that the contents of the paper were adverse to the spoliator, may be very slight and still support a judgment, though it might be wholly unsatisfactory standing alone.¹⁴ Though the secondary evidence thus given is imperfect,

vague and uncertain, every intendment and presumption is to be made against the party who might remove all doubt by producing the higher evidence.¹⁵

1, 1 Greenl. Ev. sec. 37. See cases cited below. For illustrations of the general subject see note, 14 L. R. A. 470.

2, *Armory v. Delarmirie*, 1 Str. 505.

3, *Bailey v. Shaw*, 24 N. H. 297; 55 Am. Dec. 241.

4, See cases cited below.

5, *Dalston v. Coatsworth*, 1 Will. (P.) 731.

6, *Shiels v. West*, 17 Cal. 324.

7, *Riggs v. Penn. Ry. Co.*, 16 Fed. Rep. 804.

8, *Bates* Part. sec. 983; *White v. Lincoln*, 8 Ves. 363; *Pomeroy v. Benton*, 77 Mo. 64; *Bush v. Guion*, 6 La. An. 797. In an action between partners, if one partner has wrongfully omitted to make entries or destroyed the books or refused to produce them, everything will be presumed against him that is consistent with the established facts, *Van Ness v. Van Ness*, 32 N. J. Eq. 669; *McCabe v. Franks*, 44 Iowa 208; *Hall v. Claggett*, 48 Md. 223; *Moon v. Story*, 8 Dana 226; *Diamond v. Henderson*, 47 Wis. 172. But see *Gage v. Parmalee*, 87 Ill. 329.

9, *Barker v. Ray*, 2 Russ. 72.

10, *Best* Ev. sec. 413.

11, *Blade v. Noland*, 12 Wend. 173; 27 Am. Dec. 126 and note; *Joannes v. Bennett*, 5 Allen 169; *Price v. Tallman*, 1 N. J. L. 447. But see *Moulton v. Mason*, 21 Mich. 364.

12, *Askew v. Odenheimer*, 1 Bald. (U. S.) 380; *Bott v. Wood*, 56 Miss. 136; *Merwin v. Ward*, 15 Conn. 377.

13, *Cowper v. Cowper*, 2 Will. (P.) 748; *Jones v. Murphy*, 8 Wils. & S. 275.

14, *Jones v. Knause*, 31 N. J. Eq. 609; *Rector v. Rector*, 3 Gilm. (Ill.) 105; *Hardon v. Hesketh*, 4 Hurl. & N. 175; *Roe v. Harway*, 4 Burr. 2484; *Sutton v. Davenport*, 27 L. J. C. P. 54.

15, *Thayer v. Middlesex Ins. Co.*, 10 Pick. 329.

§ 17. Presumptions from withholding evidence.—The mere withholding or failing to produce evidence, which under the circumstances would be expected to be produced and which is available, gives rise to a presumption against the party. It is a presumption less violent than that which attends the fabrication of testimony or the suppression of documents in which other parties have a legal interest; but the courts recognize and act upon the natural inference that the evidence is held back under such circumstances because it would be unfavorable.¹ The following are instances of the application of the presumption in such cases: where the owner of a vessel omitted to call the seaman who had charge of the light at the time of a collision;² where the railway company did not call the persons in charge of the train at the time of the accident;³ where a prisoner objected to the testimony of his wife who was called by the prosecution;⁴ where the plaintiff refused to appear in court, his identity being in issue;⁵ where the plaintiff in an action for personal injury failed to testify to a fact as to which he alone had knowledge and sought to have the fact inferred from other circumstances;⁶ where the plaintiff failed to produce the physician who had attended her and who could not be called by the defendant,⁷ and where the defendant in an action on a building contract refused to produce the

plans and to allow an expert witness to examine the house.⁸ The principle is frequently illustrated when the value of property is in issue and a party having the means of knowledge gives no evidence upon the subject. Thus where property was entrusted to a bailee to be sold and he gave no evidence of the amount received, it was presumed that he received the highest market price.⁹ And where a liquor dealer gave no evidence of the value of the liquor sold or of the quality it was presumed to be the cheapest liquor in which he dealt.¹⁰ Certain presumptions arise when *on notice to produce material documentary evidence* a party, being able to comply, refuses to do so.¹¹ If the other party gives parol proof of the contents of documents so withheld and if such secondary evidence is vague or uncertain, the presumptions are against the party who might have removed all doubt by producing the higher evidence.¹² It has been frequently declared as the rule that the mere non-production of books on notice has no other legal effect than to allow the other party to prove their contents by parol unless under special circumstances.¹³ But the weight of authority sustains the view that the court may properly instruct the jury that they may presume that the evidence withheld would have operated unfavorably to the one refusing to produce it.¹⁴ And in such cases if secondary evidence is given by the

party who gave notice to produce, such evidence cannot be rebutted by the production of the document withheld. The one who has withheld the testimony cannot thus take advantage of his own wrong. And he cannot use the document as evidence without the consent of the other party.¹⁵

1, *Crescent City Ins. Co. v. Ermann*, 36 La. An. 841; *Danner v. South Carolina Ry. Co.*, 4 Rich. L. 329; 55 Am. Dec. 678; *Croft v. Bill*, 35 N. H. 83; *The Laurence*, 15 Fed. Rep. 635; *Cole v. Lake Shore Ry. Co.*, 95 Mich. 77; *State v. Rodman*, 62 Iowa 456; *Rice v. Com.*, 102 Ia. St. 408; *Connecticut Ins. Co. v. Smith*, 117 Mo. 261; *Gulf Ry. Co. v. Ellis*, 54 Fed. Rep. 481. For illustrations of the general subject see 14 L. R. A. 470; 1 Smith L. C. 374; also note to *Armory v. Delarmirie*, 1 Str. 505.

2, *The Ville de Harve*, 7 Ben. (U. S.) 328.

3, *Danner v. South Carolina Ry. Co.*, 4 Rich. L. 329; 55 Am. Dec. 678.

4, *People v. Hovey*, 92 N. Y. 554.

5, *Brown v. Schock*, 77 Pa. St. 471.

6, *Cole v. Lake Shore Ry. Co.*, 95 Mich. 77; 81 id. 56. As to the failure of a party to testify in civil action, see also *Bleecker v. Johnston*, 69 N. Y. 309.

7, *Cooley v. Foltz*, 85 Mich. 47.

8, *Bryant v. Stillwell*, 24 Pa. St. 314.

9, *Clark v. Miller*, 4 Wend. 628.

10, *Clunnes v. Pezzey*, 1 Camp. 8.

11, *Haldone v. Harvey*, 4 Burr. 2486; *Barber v. Lyon*, 22 Barb. (N. Y.) 62; *Page v. Stephens*, 23 Mich. 357; *Reavis v. Orenshaw*, 105 N. C. 369.

12, *Life Ins. Co. v. Mechanics Fire Ins. Co.*, 7 Wend. 31.

13, See cases above cited and also sec. 223 *et seq. infra*.

14, *Clifton v. United States*, 4 How. 242; *Thayer v. Mid-*

dlesex Ins. Co., 10 Pick. 329; Jackson v. McVey, 18 Johns. 330; Ransford v. Bosanquet, 1 Q. B. 814. But see Harrison v. Kiser, 79 Ga. 588. But the contrary rule is held where it was admitted that the book contained the entry alleged, Cartier v. Troy Lumber Co., 138 Ill. 533.

15, Gage v. Campbell, 131 Mass. 566; Joannes v. Bennett, 5 Allen 169; 81 Am. Dec. 738; Stone v. Sanborn, 104 Mass. 319; 6 Am. Rep. 238; Tobin v. Shaw, 45 Me. 331; 71 Am. Dec. 547; Doe v. Hodgson, 12 Adol. & Ell. 135; Kingman v. Tirrell, 11 Allen 97; Ting v. United States Submarine Co., 1 Hun. 161; Down v. Donahue, 113 Mass. 151; Cohen v. Life Ins. Co., 69 N. Y. 300. See also sec. 223 *infra*.

§ 18. Same subject—Qualifications of the rule.—There is no unfavorable presumption arising from the failure to produce evidence, if it is not within the control of the one failing to produce it;¹ nor from the failure to call as a witness one whom the other party had the same opportunity of calling;² nor one whose testimony would be simply cumulative;³ nor if the testimony not given is privileged, as that of an attorney in respect to confidential communications;⁴ nor if testimony of the same character has been excluded when offered by the adverse party as inadmissible;⁵ nor if the document would not be admissible in evidence without the consent of the other party;⁶ nor if the contents of the instrument destroyed or withheld are fully and satisfactorily proved by other evidence.⁷ Where a person brought an action for an injury which had impaired his mind, it was held that no unfavorable presumptions arose because he was not called

as a witness.⁸ The destruction or mutilation of a document is not spoliation within the meaning of the rule if caused by mere inadvertence or mistake.⁹ It is for the jury to determine, under proper instructions from the court, what inferences are to be drawn from the failure of a party to produce evidence which is accessible to him or under his control.¹⁰

1, *First National Bank v. Hyland*, 6 N. Y. S. 87; 53 Hun. 108; *Gilbert v. Ross*, 7 M. & W. 121.

2, *Scovill v. Baldwin*, 29 Conn. 318; *Cross v. Lake Shore Ry. Co.*, 69 Mich. 363; *Haynes v. McRae*, 101 Ala. 318; *Mooney v. Holcomb*, 15 Ore. 639; *Diel v. Missouri Pacific Ry. Co.*, 37 Mo. App. 454; *Peetz v. St. Charles Ry. Co.*, 42 La. An. 541. Where a witness, an employe, could not be found, see *Winner v. Smith*, 22 Ore. 469.

3, *Bleecker v. Johnston*, 69 N. Y. 309, a case in which there were two defendants and only one was called.

4, *Wentworth v. Lloyd*, 10 H. L. Cas. 589.

5, *Carpenter v. Bailey*, 94 Cal. 406.

6, *Merwin v. Wood*, 15 Conn. 377; *Cartier v. Troy Lumber Co.*, 138 Ill. 533.

7, *Miltenberger v. Croyle*, 27 Pa. St. 170.

8, *Cramer v. Bentington*, 49 Iowa 213.

9, *Riggs v. Tayloe*, 9 Wheat. 487; *Tobin v. Shaw*, 45 Me. 331; 71 Am. Dec. 547; *Villors v. Villors*, 2 Atk. 71; *Livingston v. Rogers*, 2 Johns. Cas. 488.

10, *Eldridge v. Hawley*, 115 Mass. 410; *Cooley v. Foltz*, 85 Mich. 47.

§ 19. Same—Effect of the presumption on the burden and degree of proof.—It must not be inferred that the presumption

arising from the withholding or suppression of evidence by a party will wholly relieve the adverse party from the burden of proving his case. In an action for fraud upon the revenue a federal judge instructed the jury in substance that since the defendants had failed to produce proof in their possession the government need only prove that the defendants were presumptively guilty and the duty thereupon devolved upon them to establish their innocence and if they did not they were guilty. It was held on appeal that the instruction was error; that it set at naught established principles, since it substantially withdrew from the defendants their constitutional right of trial by jury and converted what at law was intended for their protection, the right to refuse to testify, into the machinery for their destruction.¹ Although, as has been seen from the cases already cited, the courts have uniformly enforced the rule that every reasonable intentment is to be made against spoliation and have sometimes used strong language in the statement of the rule, the *presumption is clearly not conclusive*, nor does it so far take the place of other proof, but that some other evidence than the mere fact of suppression or spoliation is necessary to sustain a claim against the wrongdoer. In such cases at least a *prima facie* case must be established.² The fabrication or suppression of evidence is

a fact to be considered in view of all the circumstances of the case. It may become unimportant by reason of other and perfectly satisfactory evidence of the fact or document suppressed or despoiled; it may afford evidence of the most convincing character against the wrongdoer. On the other hand one who is innocent of the charge made against him may, in excitement or fear, yield to the temptation of suppressing or manufacturing evidence.³ In a case cited by Sir Edward Coke, an uncle was charged with the murder of his niece. The motive assigned for the murder was that on the death of the niece the accused would inherit her property. Being unable to find the child the defendant dressed up another child to represent her. On the discovery of the fraud the accused was found guilty and executed; but some years afterwards it was found that the girl supposed to have been murdered was still living and had run away.⁴ Another instance is related by Jeremy Bentham, where it was proposed that all the persons present at a company should be searched to see if a valuable trinket which had been missed could be found. All submitted but one, who excited suspicion by his refusal. But when he consented to be privately searched it was found that he had not taken the trinket but had concealed some articles of food for the pur-

pose of carrying them to his wife who had no means of obtaining food.^b

1, *Chaffee v. United States*, 18 Wall. 516.

2, *Bott v. Wood*, 56 Miss. 136; *Chaffee v. United States*, 18 Wall. 516; *Cowper v. Cowper*, 2 Will. (P.) 748; *Meagly v. Hoyt*, 125 N. Y. 771; *Arbuckle v. Templeton*, 65 Vt. 205.

3, *Best Ev. sec.* 415.

4, 3 *Inst. Ch.* 104, p. 232, cited also in *Best. Ev. sec.* 415.

5, 3 *Benth. Jud. Ev.* pp. 88-89.

§ 20. Presumptions as to knowledge of the law.—The maxim, *ignorantia juris non excusat*, is based on the fact that there could be no successful administration of justice if the converse of the rule were to prevail. If prisoners accused of crime could successfully plead that they were ignorant of the illegality of their acts, no other shield for crime would need to be interposed; for no other defense could be so easily raised or so difficult to overcome. "If ignorance of the law was admitted as a ground of exception, the court would be involved in questions which it were scarcely possible to solve and which would render the administration of justice next to impossible; for in almost every case ignorance of law would be alleged and the court would, for the purpose of determining this point, be often compelled to enter upon questions of fact insoluble and indeterminable."¹ Although it has been some-

times stated that the rule has no application except in criminal cases, there seems to be no good reason for confining the rule to the criminal law. The same considerations which forbid a party to urge his ignorance of the law as a defense to a criminal charge also forbid that he should plead his ignorance of the law as an excuse for the failure to comply with contract obligations or as a defense in actions of tort. Accordingly in actions for false imprisonment officers cannot depend on the ground that they had supposed void writs to be valid.² And in actions for malicious prosecution the court will instruct the jury on the subject of probable cause, that it is the legal presumption that the parties knew the law.³ So litigants cannot claim ignorance of the law as to the presumption of payment from the lapse of time,⁴ as to their liability to pay according to the terms of their contracts⁵ or as to the priority of judgments.⁶ Holders of government bonds must be presumed to have knowledge of the laws by authority of which they were created and put in circulation and of all lawful acts done by government officers under those laws.⁷

1, Quoted in *Upton v. Tribilcock*, 91 U. S. 51. The authorities given in this chapter as special illustrations of the rule render it unnecessary to cite the large number of cases which might be mentioned as containing the general and familiar rule.

2, *Pattison v. Prior*, 18 Ind. 440.

3, *Wills v. Noyes*, 12 Pick. 324.

4, *Goodwyn v. Baldwin*, 59 Ala. 127.

5, *Mears v. Graham*, 8 Blackf. (Ind.) 144; *Clarcke v. Dutcher*, 9 Cow. 674; *Warder v. Tucker*, 7 Mass. 449; *Upton v. Tribilcock*, 91 U. S. 51.

6, *Shorwell v. Murray*, 1 Johns. Ch. 512.

7, *Morgan v. United States*, 113 U. S. 476.

§ 21. Effect of mistake as to matters of law.—While ignorance of fact is a constant ground for relief in courts of justice, the cases are rare in which parties have been allowed to obtain relief on the ground of mistake of law. When a party seeks relief on the ground that, although he was fully cognizant of all the facts, he has misapprehended his legal rights, he has to face the objection that all persons of sound and mature mind are presumed to know the law. Even in the exceptional cases in which relief seems to have been granted on the ground of mistake of law, it will be generally found that some element of fraud or mistake of fact or inequitable conduct of the other party has been to some extent relied upon as the basis of equitable relief.¹ Under peculiar circumstances, when two parties ignorant of a matter of law enter into a contract for a particular object and the result according to law is different from what they mutually intended, courts of equity will interfere to prevent the enforcement of the contract and to relieve them from the unexpected consequences of it. Such action is deemed

necessary to prevent one party taking an unconscientious and inequitable advantage of the other and to stop him from deriving a benefit from the contract which neither of them intended it should produce.² The rule that ignorance of the law is no ground for relief applies to a non-resident who is presumed to know the law of the place where he contracts.³ But mistake as to foreign law is sometimes treated as a mistake of fact.⁴ Thus where heirs residing in Massachusetts voluntarily partitioned their inheritance, situated in New York, under misapprehension as to the New York law and one receives less than his proper share, he was allowed to have the settlement set aside.⁵ But where a party in one state makes a contract with direct reference to the law of another state he will be presumed to have known the law of such state.⁶

1, This subject is ably discussed and authorities are cited in *Pom. Eq. sec. 840 et seq.* See also note, 23 *Am. Dec.* 164.

2, *Champlin v. Laytin*, 6 *Paige* 189, 195.

3, *Tyson v. Passmore*, 2 *Pa. St.* 122; 44 *Am. Dec.* 181.

4, *Norton v. Marden*, 15 *Me.* 45; 32 *Am. Dec.* 132.

5, *King v. Doolittle*, 1 *Head* 77.

6, *Huthsing v. Bosquet*, 3 *McCrary* 569; *Dalrymple v. Dalrymple*, 2 *Hagg. Const.* 61.

§ 22. Parties presumed to know the legal effect of their contracts.—It is but the logical result of the rule under dis-

cussion that persons are presumed to know the legal effect of instruments which they have signed¹ and, in the absence of evidence showing fraud or mistake, this presumption becomes so far conclusive that no evidence can be introduced to show an understanding different from that which the law would imply from the instrument itself,² and the contract should be interpreted as the parties must be supposed to have understood its terms at the time.³ In like manner it is presumed that every man knows the contents of that which he signs, or to which he directs his name to be signed,⁴ or which he executes by making his mark;⁵ and the rule applies although the person is unable to read or write.⁶ Although this is a presumption which is useful as establishing the burden of proof, it is so far from being conclusive that in practice it is often overcome by proof of mistake of fact or of fraud.⁷ Every suitor is presumed to know the records of the legal proceeding in which he is engaged.⁸ But there is no presumption in the proof of a will that the deceased knew the instrument to be a will; in such case some proof of the testamentary capacity of the testator must be given.⁹ Nor is there any presumption that an attesting witness to an instrument has knowledge of its contents.¹⁰ Since everyone is bound to know the law, misrepresentations respecting it afford no ground of action or

defense.¹¹ Thus, where the party signs the contract he intended to sign without any mistake as to the facts, but in law incurs a greater liability than he expected or than was represented to exist, the misrepresentation as to matters of law is no defense.¹² But if the misrepresentation relates both to matters of fact and law the rule does not apply.¹³ Nor does the rule apply where a party professes to know what the foreign law is and falsely represents the law and misleads the person with whom he is dealing, since foreign law is treated as a matter of fact.¹⁴ The general rule is also subject to the qualification that if the relation of the parties is one of confidence and trust, misrepresentations as to the law may be fraudulent.¹⁵

1, *Mears v. Graham*, 8 Blackf. (Ind.) 144; *Kernochan v. Murray*, 111 N. Y. 306; 7 Am. St. Rep. 744.

2, *Gist v. Drakeley*, 2 Gill. 330; 41 Am. Dec. 426.

3, *Clay v. Ballard*, 9 Rob. (La.) 308; 41 Am. Dec. 328.

4, *Clem v. Railway Co.*, 9 Ind. 488; 68 Am. Dec. 653; *Harris v. Story*, 2 E. D. Smith (N. Y.) 363.

5, *Doran v. Mullen*, 78 Ill. 342.

6, *Doran v. Mullen*, 78 Ill. 342.

7, See secs. 440 and 442 *infra*.

8, *Watrous v. Rodgers*, 16 Tex. 410; *Gouldin v. Shehee*, 20 Ga. 531.

9, *Gerrish v. Nason*, 22 Me. 438; 39 Am. Dec. 589; *Swett v. Boardman*, 1 Mass. 258; 2 Greenl. Ev. sec. 675. But see *Doran v. Mullen*, 78 Ill. 342. See annotated case, 17 L. R. A., and sec. 187 *infra*.

10, *Hill v. Johnston*, 3 Ired. Eq. 432.

11, *Lewis v. Jones*, 4 Barn. & C. 506; *Platt v. Scott*, 6 Blackf. (Ind.) 389; 39 Am. Dec. 436; *Mears v. Graham*, 8 Blackf. (Ind.) 144; *Fish v. Cleland*, 33 Ill. 238; *Rashdall v. Ford*, L. R. 2 Eq. 750; *Steamboat Belfast v. Boon Co.*, 41 Ala. 50; *Russell v. Branham*, 8 Blackf. (Ind.) 277; *People v. Supervisors*, 27 Cal. 655; *Jagger v. Winslow*, 30 Minn. 263; *Insurance Co. v. Reed*, 33 Ohio St. 283; *Gormley v. Gymnastic Association*, 55 Wis. 350; *Thompson v. Phoenix Insurance Co.*, 75 Me. 55; 46 Am. Rep. 357; *Burt v. Bowles*, 69 Ind. 1.

12, *Fish v. Cleland*, 33 Ill. 238; *Mears v. Graham*, 8 Blackf. (Ind.) 144; *Martin v. Wharton*, 38 Ala. 637; *Upton v. Tribilcock*, 91 U. S. 45, action on a subscription to stock.

13, *Brown v. Rice's Administrator*, 26 Gratt. (Va.) 467; *Ross v. Drinkard's Administrator*, 35 Ala. 434; *Broughton v. Hutt*, 3 De Gex & J. 501.

14, *Bethell v. Bethell*, 92 Ind. 318.

15, *Jagger v. Winslow*, 30 Minn. 263; *Durr v. Shockleford*, 50 Ala. 437; *Adair v. Brimmer*, 74 N. Y. 539; *Kerr Fraud & M.*, pp. 401, 402.

§ 23. **Presumption that men know the consequences of their acts.**—Another rule closely allied to the last and of constant application, especially in the criminal law, is that men of sound mind are presumed to intend the natural and necessary consequences of acts which they intentionally perform. The rule is thus broadly stated by Mr. Greenleaf: "Thus also, a sane man is conclusively presumed to contemplate the natural and probable consequences of his own acts."¹ It would be clearly repugnant to justice that one should be conclusively pre-

sumed to intend the consequences of his accidental or unavoidable acts. But when the proper limitations are observed the rule is hardly open to the severe criticism it has often received. Indeed, there is no rule of law which rests on a better basis of authority or public policy. The following are illustrations of the rule: One who knowingly utters a forged bill is presumed to intend to defraud.² The presumption in such case is so far conclusive that the defendant will not be allowed to prove that he intended to pay at maturity.³ So one who voluntarily does an act which has a direct tendency to destroy another's life is presumed to have intended to destroy life,⁴ and it is presumed that one who wilfully sets fire to the property of another intends to injure the owner.⁵ Though this presumption has its most frequent application in the criminal law and is frequently classified as a presumption belonging to that branch of law, yet it obtains with equal reason in civil cases. This is illustrated by the cases already cited and in many actions of tort where the question of intent is material and where there may be no mode of determining the mental processes of the defendant except from his acts. Thus the publisher of a libel is presumed to have acted intentionally and to have intended injury;⁶ and if the acts of an insolvent debtor actually give a preference to certain credit-

ors the intention to give such preference is presumed.⁷ In like manner if one heavily embarrassed makes a voluntary conveyance of all his property, the intention to defraud creditors is presumed.⁸

1, 1 Greenl. Ev. sec. 18. See criticism in 2 Whart. Ev. sec. 1258.

2, King v. Sheppard, Russ. & R. Cr. C. 169.

3, Reg. v. Hill, 2 Moody Cr. C. 30.

4, Com. v. York, 9 Met. 93; 43 Am. Dec. 373.

5, Rex v. Farrington, Russ. & R. Cr. C. 207.

6, Haire v. Wilson, 9 Barn. & C. 643; Newell Defamation sec. 22; Townsh. Sland. & Lib. sec. 68 and cases.

7, Denny v. Dana, 2 Cush. 161.

8, Kaine v. Weigley, 22 Pa. St. 179.

§ 24. Presumptions as to malice.—In close logical connection with the subject discussed in the last section is the presumption of malice arising in those crimes where malice is an ingredient and especially in cases of homicide.¹ The rule that malice will be presumed from the mere fact of homicide was very positively and broadly stated by some of the early English commentators.² Thus Blackstone used the following language: "All homicide is presumed to be malicious until the contrary appeareth in evidence."³ This view has been frequently criticised on the ground that it places the burden of proof upon the defendant, contrary to the spirit of the common law; and on the ground that it ar-

bitrarily assumes the homicide not only to be unlawful but of the most aggravated character known to the law.⁴ The rule is stated more guardedly by modern authorities in this country. But by the weight of authority malice is presumed, when an intentional homicide is proved and no justification or excuse or circumstances of mitigation appear in the evidence.⁵ In such case the killing is at least presumed to be unlawful though it may not under some of the authorities be presumed to be murder in the first degree under the statutes.⁶ But if the circumstances attending the homicide are fully shown by the evidence either for the prosecution or defense and circumstances of excuse appear, there is no presumption of malice. Where all the circumstances of the homicide are given in evidence, the burden remains on the prosecution throughout the case.⁷ In a celebrated case where all the details of the homicide were given in evidence the jury were instructed in substance that, as the homicide was conceded, the law implied a motive and consequently the crime of murder in the first degree, and that they should find the prisoner guilty unless he had given evidence satisfying them that it was manslaughter or excusable homicide. This was held error on the ground that it improperly placed the burden of proof upon the defendant, and that there was no presumption under the circumstances of the

specific intent involved in the statute.⁸ The law in *civil actions* recognizes also the presumption of malice from certain wrongful acts. Thus malice is presumed from the deliberate publication of a libel or slander. There need be no proof of malice in the popular sense, but in its legal sense any unlawful act done wilfully and purposely to the prejudice of another is malicious.⁹

1, Com. v. York, 9 Met. 93.

2, Fast P. C. p. 224.

3, 4 Bl. Com. 201.

4, See article, N. A. Rev. vol. 72, p. 178; also discussion of this subject and cases cited in 2 Whart. Ev. sec 1262 *et seq.*

5, Oliver v. State, 17 Ala. 587; State v. Gillick, 7 Iowa 287; Clarke v. State, 35 Ga. 75; Murphy v. People, 37 Ill. 447; Com. v. Drew, 4 Mass. 391; Mitchell v. State, 5 Yerg (Tenn.) 340; State v. Willis, 63 N. C. 26; Green v. State, 28 Miss. 687; Speis v. People, 122 Ill. 1; 3 Am. St. Rep. 320; Marntinez v. State, 30 Tex. Ct. App. 129. See 9 Am. & Eng. Ency. Law 544, and cases cited. But see Com. v. Hawkins, 3 Gray 463; Maher v. People, 10 Mich. 212.

6, Hill v. Com., 2 Gratt. (Va.) 594, and cases last cited.

7, Com. v. Hawkins, 3 Gray 463, and cases cited above.

8, Stokes v. People, 53 N. Y. 164. See also Com. v. Drum, 58 Pa. St. 9; Hamby v. State, 36 Tex. 523; State v. Mitchell, 64 Mo. 191; Roberts v. People, 19 Mich. 401; Mayher v. People, 10 Mich. 212; State v. Foster, 61 Mo. 549.

9, King v. Root, 4 Wend. 113; 21 Am. Dec. 102; Com. v. Snelling, 15 Pick. 337; Byrket v. Monohon, 7 Blackf. (Ind.) 83; Haire v. Wilson, 9 Barn. & C. 643; Fisher v. Clement, 18 Barn. & C. 472; Bodwell v. Osgood, 3 Pick. 379.

§ 25. Presumptions as to regularity — General rule.— We now come to the discussion of the principle embodied in the familiar maxim, *omnia praesumuntur rite et solenniter esse acta*. The principle is that where acts are of an official nature or require the concurrence of official persons a presumption arises in favor of their regularity. Mr. Stephen thus states the rule: "When any judicial or official act is shown to have been done in a manner substantially regular, it is presumed that formal requisites for its validity were complied with."¹ While this presumption had its origin in respect to acts of an official and judicial character, it will be seen during the discussion which follows that it is constantly applied in the courts to contracts and other acts of an unofficial character when such acts are not illegal or repugnant to natural right.

¹, Steph. Ev. art. 101; Co. Litt. 6 b. 332; Broom Leg. Max. 942. See sec. 26 *et seq. infra*.

§ 26. Regularity of judicial proceedings — Jurisdiction.— Valuable property rights often depend upon the presumption that judicial proceedings have been regularly and properly conducted. This is especially true after the lapse of time has rendered it practically impossible to furnish extraneous evidence that the requirements of law have been in all respects complied with. In re-

spect to jurisdiction the doctrine was long since declared in a leading case as follows: "The rule for jurisdiction is this, that nothing shall be intended to be out of the jurisdiction of a superior court but that which specially appears to be so."¹ This rule has been fully upheld by the decisions in this country and the doctrine is well settled that, in favor of a court of general jurisdiction, it is presumed that it had jurisdiction of the person of the defendant though that fact does not appear in the record.² The presumption extends not only to the parties but to the subject matter. Jurisdiction as to the subject matter generally appears from the character of the judgment and the law of the forum; and when this appears to exist, jurisdiction over the parties is presumed.³ It will be seen that the rule includes those cases where the jurisdictional facts do not appear on the record. In any attempt to impeach the judgment collaterally it will be presumed that the necessary facts existed. Thus it has been presumed that a necessary affidavit had been filed;⁴ that the defendant had waived the right of being sued in his own county,⁵ and that an appearance by an attorney was authorized.⁶ In cases of default if the papers are lost or destroyed, it will be presumed that proper service was made and that the proceedings were regular.⁷ And generally if parts of the record are lost, or if the record is silent

on the subject of jurisdiction, or if its statements are incomplete or obscure on the subject, unless the want of jurisdiction is distinctly shown, it will be presumed.⁸

1, *Peacock v. Bell*, 1 Saund. 74. See also *Kenney v. Greer*, 13 Ill. 432; 54 Am. Dec. 439; *Royse v. Turnbaugh*, 117 Ind. 539.

2, *Foot v. Stevens*, 17 Wend. 483; *Voorhees v. United States Bank*, 10 Peters 447; *Kobb v. Lessee*, 15 Ohio 689; *Bustard v. Gates*, 4 Dana (Ky.) 435; *Horner v. Doe*, 1 Ind. 130; 48 Am. Dec. 355; *Carter v. Jones*, 5 Ired. Eq. (N. C.) 196; 49 Am. Dec. 425; *Fox v. Hoyt*, 12 Conn. 491; 31 Am. Dec. 760; *Reynolds v. Stansbury*, 20 Ohio 344; 55 Am. Dec. 459; *Herd v. Cist* (Ky. 1889), 12 S. W. Rep. 446; *City of St. Louis v. Lanigan*, 97 Mo. 175; *Hempstead v. Cargill*, 46 Minn. 141; *Sichler v. Look*, 93 Cal. 600.

3, *Galpin v. Page*, 18 Wall. 350.

4, *Freem. Judg. sec. 124*; *Withers v. Patterson*, 27 Tex. 491; 86 Am. Dec. 643; *Bush v. Lindsey*, 24 Ga. 245; 71 Am. Dec. 117; *Palmer v. Oakley*, 2 Doug. (Mich.) 433; 47 Am. Dec. 41; *Weaver v. Brown*, 87 Ala. 533; *Stahl v. Mitchell*, 41 Minn. 325; *Reinig v. Hecht*, 58 Wis. 212; *Prince v. Griffin*, 16 Iowa 552.

5, *Kenney v. Greer*, 13 Ill. 432; 54 Am. Dec. 439.

6, *Reynolds v. Fleming*, 30 Kan. 106; 46 Am. Rep. 86.

7, *Evans v. Young*, 10 Col. 316; *Fogg v. Gibbs*, 8 Baxt. (Tenn.) 464.

8, *Horner v. State Bank*, 1 Ind. 130; 48 Am. Dec. 355; *Coit v. Haven*, 30 Conn. 190; *Lawler v. White*, 27 Tex. 250; *Sweirengen v. Gulick*, 67 Ill. 208; *Goar v. Maranda*, 57 Ind. 339; *Sharp v. Brunnings*, 35 Cal. 528; *Groves v. First National Bank*, 77 Tex. 555; *Yaeger v. City of Henry*, 39 Ill. App. 21. For discussion see secs. 628, 633 *et seq. infra*.

§ 27. Presumptions not allowed to contradict the record.—But no presumption can be allowed against the express

statements of the record; thus if the return or proof of service shows service at a particular place or upon a person not defendant and there is no averment of other service, there is no room for presumption.¹ And if the record shows certain steps to have been taken, which in law are insufficient to sustain the judgment, no other steps will be presumed; thus if it appears that service was made in a particular manner no other mode of service can be presumed since this would be a contradiction of the record.² On the same principle where the judgment recites the facts conferring jurisdiction such recitals are presumed to be correct. And by the weight of authority such recitals in a domestic judgment are so far conclusive that on grounds of public policy the law does not permit the introduction of extraneous evidence to rebut them in any collateral proceeding.³ It may of course be shown that the recitals as to jurisdiction in one part of the record are contradicted by recitals in another part.⁴ In such cases the whole record will be examined and, if the inconsistency is such that it can be reconciled or if the contradiction is only inferential, the recitals in the judgment showing jurisdictional facts will govern.⁵

1, *Galpin v. Page*, 18 Wall. 350, 364.

2, *Freem. Judg.* sec. 125; *Haring v. Chambers*, 103 Pa. St. 175; *Clark v. Thompson*, 47 Ill. 25; 95 Am. Dec. 457;

Hahn v. Kelly, 34 Cal. 391; 94 Am. Dec. 742. For example, that a guardian *ad litem* appeared for infant defendants when the record states there was default, **Schaefer v. Gates**, 2 B. Mon. (Ky.) 453; 38 Am. Dec. 164.

3, **Walker v. Cronkite**, 40 Fed. Rep. 133; **Granger v. Clark**, 22 Me. 128; **Cook v. Darling**, 18 Pick. 393; **Hartman v. Ogborn**, 54 Pa. St. 120; 93 Am. Dec. 679; **Callen v. Ellison**, 13 Ohio St. 446; 82 Am. Dec. 448; **Maples v. Mackey**, 89 N. Y. 146; **Rogers v. Beauchamp**, 102 Ind. 33; **McAuley v. Fulton**, 44 Cal. 355; **Wilchen v. Robertson**, 78 Va. 602. Contra, **Ferguson v. Crawford**, 70 N. Y. 253; 26 Am. Rep. 589. See secs. 628, 633 *et s. q. infra*.

4, **Callen v. Ellison**, 13 Ohio St. 446; 82 Am. Dec. 448.

5, **Turner v. Jenkins**, 79 Ill. 228; **Smith v. Wood**, 37 Tex. 616; **Treadway v. Eastburn**, 57 Tex. 209.

§ 28. Limitations of the rule—Service by publication—Ministerial powers.—By the weight of authority the presumption is limited to the jurisdiction over persons within the territorial limits of the courts who can be reached by the process of the courts. Hence under the statutes allowing service by publication on persons outside the state, no such presumptions are indulged. It is the prevailing rule that, since such proceedings are contrary to the course of the common law, the requirements of the statute must be strictly followed and that defects and omissions are not to be aided by presumptions in favor of jurisdiction.¹ But there are decisions which assert that there is no substantial reason for any such distinction between the presumptions which arise in serv-

ice by publication and personal service.² Where a court of general jurisdiction is authorized in a proceeding, either statutory or at law or in equity, to bring in, by publication or other substituted service, non-resident defendants interested in or having a lien upon property lying within its territorial jurisdiction, but is not required to place the proof of service upon the record, and the court orders such substituted service, it will be presumed in favor of the jurisdiction that service was made as ordered, although no evidence thereof appears of record; and the judgment of the court, so far as it affects such property, will be valid.³ Another limitation generally recognized by the courts has been thus expressed: "When a court of general jurisdiction has conferred upon it special powers by special statute, and such special powers are exercised *judicially*, that is, according to the course of the common law and of proceedings in chancery, such judgment cannot be impeached collaterally. But when a court of general jurisdiction has conferred upon it special and summary powers, wholly derived from statutes which do not belong to it as a court of general jurisdiction, and when such powers are not exercised according to the course of the common law, its action being *ministerial* only and not judicial,—in such case its decision must be regarded and treated like those of courts of limited

and special jurisdiction and no such presumption of jurisdiction will attend the judgment of the court. But in such cases the facts essential to the exercise of the special jurisdiction must appear upon the face of the record." 4

1, Galpin v. Page, 18 Wall. 350; Boyland v. Boyland, 18 Ill. 551; Neff v. Pennoyer, 3 Sawy. (U. S.) 274; Brownfield v. Dyer, 7 Bush (Ky.) 505.

2, Stewart v. Anderson, 70 Tex. 588; Gemmell v. Rice, 13 Minn. 400.

3, Applegate v. Lexington Mining Co., 117 U. S. 255. See sec. 624 *et seq. infra*.

4, Pulaski Co. v. Stuart, 28 Gratt. (Va.) 872; Thatcher v. Powell, 6 Wheat. 119; 62 Am. Dec. 785; Cooper v. Sunderland, 3 Iowa 114; 66 Am. Dec. 52; Shivers v. Wilson, 5 Har. (N. J.) 130; 9 Am. Dec. 497; Foster v. Glazener, 27 Ala. 391; Denning v. Corwin, 11 Wend. 647; Ludlow v. Johnson, 3 Ohio 553; 17 Am. Dec. 609; Embury v. Connor, 3 N. Y. 511; 53 Am. Dec. 325; Brown v. Wheelock, 75 Tex. 385; Freem. Judg. sec. 123; Black Judg. sec. 279. The fact that judgments are entered on warrant of attorney does not render the proceeding of this statutory character, Bush v. Hanson, 70 Ill. 480.

§ 29. Regularity of proceedings subsequent to gaining jurisdiction.—The presumption not only applies to the fact of jurisdiction but to the regularity of proceedings subsequent to the gaining of jurisdiction. When the jurisdiction of a competent court has attached every act is presumed to have been rightly done until the contrary appears. This applies not only to the final decree but to every judgment or order rendered in the

various stages of the proceeding.¹ Thus if a bill of exceptions does not contain all the evidence it will be presumed that the evidence was sufficient to support the judgment.² So it will be presumed that improper evidence was not admitted unless the record shows otherwise;³ that improper evidence, if admitted, was disregarded;⁴ that every fact susceptible of proof was proved;⁵ that the charge of the court was correct, unless the record shows to the contrary;⁶ that an instruction was refused because not in writing, if the law required instructions to be in writing and the record does not show it to have been written;⁷ that the grand jury were duly subpoenaed,⁸ and that the trial jury were duly sworn⁹ and in charge of a sworn officer,¹⁰ duly admonished by the judge,¹¹ and that they were of such intelligence as to understand the charge.¹² It will also be presumed that the prisoner was present in court during all proceedings;¹³ that the bill of exceptions is correct;¹⁴ that the judgment was regular,¹⁵ and that the verdict is in proper form. After verdict all presumptions are in its favor.¹⁶ After judgment it will be presumed that the summons was duly served;¹⁷ that, if a discharge in bankruptcy or insolvency has been granted, the proper steps were taken;¹⁸ if a writ is properly returned, that it was duly served;¹⁹ that the necessary parties were before the court;²⁰ that all persons interested had

due notice,²¹ and that several acts in a judicial proceeding, if performed on the same day, were performed in the order necessary to give them legal effect.²² Where an order has been made, it will be presumed that the court had the proper evidence for making the same;²³ where judicial records and documentary evidence are lost and proved by secondary evidence, the usual presumption as to regularity applies.²⁴ The rule has been declared that this presumption of regularity in judicial proceedings arises only between parties to the proceedings and not between a party and a stranger.²⁵ The reasons on account of which the courts indulge such presumptions as have been above enumerated are thus stated in a Pennsylvania case: "We are not to expect too much from the records of judicial proceedings. They are memorials of the judgments and decrees of the judges and contain a general, but not particular, detail of all that occurs before them. If we should insist upon finding every fact fully recorded which must occur before a citizen could be punished for an offense against the laws, we should destroy public justice and give unbridled license to crime. Much must be left to intendment and presumption, for it is often less difficult to do things correctly than to describe them correctly." ²⁶

1, *Fox v. Hoyt*, 12 Conn. 491; 31 Am. Dec. 760; *Jackson v. Astor*, 1 Pinn. 137; 39 Am. Dec. 289; *Slicer v. Bank*

of Pittsburg, 16 How. 571; Blair v. Railway Co., 89 Mo. 383.

2, Wagers v. Dickey, 17 Ohio 439; 49 Am. Dec. 467; Wood v. Lakeshore Ry. Co., 49 Mich. 370; Butler v. Winona Mill Co., 28 Minn. 205; 41 Am. Rep. 277; Belkner v. Rhodes, 76 Mo. 643; Fife v. Com. 29 Pa. St. 429; Abbott v. Johnson, 47 Wis. 239; United States v. White, 5 Cranch C. C. 73; Credit Foncier v. Rogers, 10 Neb. 184.

3, Wetmore v. Mell, 1 Ohio St. 26; 59 Am. Dec. 607; Sutton v. Reagan, 5 Blackf. (Ind.) 217; 33 Am. Dec. 466; Baston v. Lewis (Ariz.), 20 Pac. Rep. 310.

4, Ritter v. Schenk, 101 Ill. 387.

5, Walling v. Kinnard, 10 Tex. 508; 60 Am. Dec. 216.

6, Sims v. State, 68 Ga. 486; Lackley v. Bostwick, 54 Ga. 45.

7, Green v. State, 66 Ala. 40; 41 Am. Rep. 744.

8, Long v. State, 46 Ind. 582.

9, Osgood v. State, 64 Wis. 472.

10, State v. Pitts, 11 Iowa 343.

11, State v. Shellady, 8 Iowa 477.

12, Hart v. Newton, 48 Mich. 401.

13, People v. Stuart, 4 Cal. 218. But in French v. State, 85 Wis. 400, a conviction of murder was not sustained where neither the minutes of the clerk nor the record showed that the prisoner was present in court when the verdict of guilty was rendered or that he was present when sentence was pronounced against him, but in Hoffman v. State, 88 Wis. 166, such defective record was allowed to be amended upon testimony of the clerk and the sheriff.

14, Eastman v. People, 93 Ill. 112.

15, Falkner v. Christian, 51 Ala. 495; Bunker v. Rand, 19 Wis. 271.

16, Gentry v. McKehen, 5 Dana (Ky.) 34; Christ v. People, 3 Col. 394.

17, Ray v. Rowley, 1 Hun 614.

18, *Young v. Ridenbough*, 3 Dill. (U. S.) 239; *Salters v. Tobias*, 3 Paige Ch. 338.

19, *Drake v. Duvenick*, 45 Cal. 455.

20, *Jones v. Edwards*, 78 Ky. 6.

21, *Brown v. Wood*, 17 Mass. 68; *Gibson v. Foster*, 2 La. An. 509.

22, *Knowlton v. Culver*, 2 Pinn. 243; 52 Am. Dec. 156; *Metts v. Bright*, 4 Dev. & B. (N. C.) 173; 32 Am. Dec. 683.

23, *Com. v. Bolkom*, 3 Pick. 281; *Barnard v. Heydrick*, 49 Barb. 62; *State v. Lewis*, 22 N. J. L. 564.

24, *In re Warfield*, 22 Cal. 51; 83 Am. Dec. 49; *Carroll v. Peake*, 1 Peters 18.

25, *Seechrist v. Baskin*, 7 Watts & S. (Pa.) 403; 42 Am. Dec. 251.

26, *Beale v. Com.*, 25 Pa. St. 11.

• **§ 30. Same — Federal courts.**—The same presumptions which are indulged in favor of courts of general jurisdiction of the several states are extended to the federal courts. "The district and circuit courts of the United States, though of limited jurisdiction, are not inferior courts in the technical sense of the term. If jurisdiction do not appear upon the proceedings, their judgments and decrees will be reversed on error or appeal. But they are not nullities which may be disregarded in a collateral proceeding. In this respect the district and circuit courts of the United States stand on the same footing as courts of general jurisdiction; and the authority of such courts is always presumed, until the contrary is shown." ¹

1, *Ruskman v. Cowell*, 1 N. Y. 505, 507; *Reed v. Vaughn*, 15 Mo. 137; 55 Am. Dec. 133; *Thomas v. Southard*, 2

Dana (Ky.) 475; 26 Am. Dec. 467; Byers v. Fowler, 12 Ark. 218; 54 Am. Dec. 271; Tunell v. Warren, 25 Minn. 9; Pierro v. St. Paul Ry. Co., 37 Minn. 313.

§ 31. The rule as to inferior courts.—It is well settled that the presumption in favor of jurisdiction does not apply to certain inferior courts of special and limited jurisdiction. In the same leading case above referred to, the rule was thus declared: "Nothing shall be intended to be within the jurisdiction of an inferior court but that which is expressly so alleged."¹ By this it is meant that it must appear on the face of the proceedings of such courts that they have acted within the scope of their authority; and that the minutes or record must affirmatively show the existence of all facts necessary to jurisdiction.² It does not necessarily follow however that the judgment is absolutely void if the matters necessary to jurisdiction do not appear. In such case, although there is no presumption in favor of jurisdiction, it has been held admissible to show the necessary facts by extraneous evidence.³ Courts of justices of the peace are clearly included within the list of inferior courts and their jurisdiction must be affirmatively shown,⁴ although in a few states the same presumptions are indulged in their favor as in courts of record.⁵ The rule that no presumptions are indulged in favor of the proceedings of inferior courts only applies to the question of

jurisdiction; and such courts like others are presumed to have acted correctly as to matters within their jurisdiction.⁶ Thus if the docket of a justice shows that a case was called on the return day of the summons it will be presumed that it was called at the hour named in the summons.⁷

1, *Peacock v. Bell*, 1 Saund. 73; *Lowry v. Erwin*, 6 Rob. (La.) 192; 39 Am. Dec. 556; *Tucker v. Harris*, 3 Ga. 1; 58 Am. Dec. 488.

2, *Kemp v. Kennedy*, 5 Cranch. 173; *Hall v. Howd*, 10 Conn. 514; 27 Am. Dec. 696; *Cooper v. Sunderland*, 3 Iowa 114; 66 Am. Dec. 52; *Horan v. Wahrenberger*, 9 Tex. 313; 58 Am. Dec. 145; *Adams v. Tiernan*, 5 Dana (Ky.) 394; *Rutherford v. Crawford*, 53 Ga. 138. See sec. 630 *infra*.

3, *Jolley v. Foltz*, 34 Cal. 321; *Van Deuzen v. Sweet*, 51 N. Y. 381. But such proof is not allowed as to facts which the statutes expressly require to be recorded, see cases last cited.

4, *Spear v. Carter*, 1 Mich. 19; 48 Am. Dec. 688; *Levy v. Sherman*, 6 Ark. 182; 42 Am. Dec. 690; *King v. Inhabitants of All Saints*, 7 Barn. & C. 785.

5, *Billings v. Russell*, 23 Pa. St. 189; 62 Am. Dec. 330; *Fox v. Hoyt*, 12 Conn. 497; 31 Am. Dec. 760; *Wright v. Hazen*, 24 Vt. 143; *Turner v. Ireland*, 11 Humph. (Tenn.) 447; *Stevens v. Mangum*, 27 Miss. 481.

6, *McGrews v. McGrews*, 1 Stew. & P. (Ala.) 30; *Bacon v. Bassett*, 19 Wis. 45; *Slicer v. Bank of Pittsburg*, 16 How. 571; *State v. Hinchman*, 27 Pa. St. 479.

7, *Driscoll v. Smith*, 59 Wis. 38.

§ 32. Same — Courts of probate.— The rule has sometimes been declared that the probate or county courts of this country as generally created are not courts of general

jurisdiction within the meaning of the rule, and that no intendments can be made in favor of their jurisdiction beyond what appears on the face of the proceedings.¹ But while it is true that such courts are courts of limited jurisdiction, yet they very generally have general jurisdiction over the administration of estates; they are courts of record, having very extensive powers; and a fair regard for the security of property rights demands that the same presumptions should be extended in favor of their acts as to those of other courts of record. In the opinion of the author this view is sustained by the weight of authority.² As illustrations of cases where presumptions in favor of judicial proceedings in probate have been allowed, it was held that letters of administration are presumptive evidence that the requisite oath was taken;³ that letters of guardianship regular on their face were legally issued;⁴ that an administrator's bond was given in open court, when an order of court recited that he had been duly appointed, and that there was due publication of notices, when a subsequent order recited the same.⁵ But where the records are apparently entire and no loss of papers is suggested it cannot be presumed that a final judgment has been made which does not appear;⁶ nor can it be presumed that an administrator's sale has been confirmed.⁷ Special weight attaches to the presumption of regularity in such

proceedings after great lapse of time; and after the lapse of many years the presumption has sometimes been held conclusive.¹

1, *Strouse v. Drennan*, 41 Mo. 289; *Fairfield v. Gullifer*, 49 Me. 360. As to the effect of such judgments see sec. 626 *infra*.

2, *Johnson v. Beazley*, 65 Mo. 250; *Propst v. Meadows*, 13 Ill. 157; *Schroyer v. Richmond*, 16 Ohio St. 455; *Kimball v. Fisk*, 39 N. H. 110; 75 Am. Dec. 213; *Roderigras v. East River Savings Institute*, 63 N. Y. 460; 20 Am. Rep. 555; *Fletcher v. Wier*, 7 Dana (Ky.) 345; *Irwin v. Scriber*, 18 Cal. 499; *Wyatt v. Steele*, 26 Ala. 639; *People v. Gray*, 72 Ill. 343; *Redmond v. Anderson*, 18 Ark. 449; *Brien v. Hart*, 6 Humph. (Tenn.) 131; *People v. Cole*, 84 Ill. 327. Contra, *Musselman's Appeal*, 65 Pa. St. 485; *Lex's Appeal*, 97 Pa. St. 289; *Martin v. Williams*, 42 Miss. 210; 97 Am. Dec. 456. And see *Mercer v. Chase*, 9 Allen 242; *Peters v. Peters*, 8 Cush. 529.

3, *Brooks v. Walker*, 3 La. An. 150.

4, *Den v. Gaston*, 25 N. J. L. 615.

5, *Tucker v. Harris*, 13 Ga. 1; 58 Am. Dec. 488; *Moore v. Neil*, 39 Ill. 256; 89 Am. Dec. 303.

6, *Hathaway v. Clark*, 5 Pick. 490; *Picot v. Bates*, 39 Mo. 292.

7, *Walker v. Jessup*, 43 Ark. 163.

8, *Sprague v. Litherberry*, 4 McLean (U. S.) 442; *Austin v. Jordan*, 35 Ala. 642; *Steward v. Dedier*, 16 Neb. 58; *Stevenson v. McReary*, 17 Smed. & M. (Miss.) 9; 51 Am. Dec. 102; *Wyatt v. Scott*, 33 Ala. 313; *Desverges v. Desverges*, 31 Ga. 753; *Brown v. Wood*, 17 Mass. 68.

§ 33. Same — As to judgments in other states.—The same presumption in favor of jurisdiction may be invoked when a judgment rendered in one state is sued on in a sister state. If the record produced shows on its

face no want of jurisdiction, it will be presumed that the judgment was properly rendered even though the facts upon which jurisdiction depended do not affirmatively appear.¹ So it will be presumed in favor of jurisdiction that proceedings intermediate the commencement of the action and the judgment were regular in their character; and that the findings of the court in favor of its jurisdiction were correct.²

1, *Buffum v. Stimpson*, 5 Allen 591; 81 Am. Dec. 767; *Stewart v. Stewart*, 27 W. Va. 167; *Lockhart v. Locke*, 42 Ark. 17; *Mills v. Stewart*, 12 Ala. 90; *Lincoln v. Tower*, 2 McLean (U. S.) 473; *Dodge v. Coffin*, 15 Kan. 277; *Davis v. Connelly's Executors*, 413 B. Mon. (Ky.) 131. See sec. 634 *infra*.

2, *Harper v. Nichol*, 13 Tex. 151; *Nunn v. Sturges*, 22 Ark. 389.

§ 34. Same — Collateral and direct proceedings — Awards of arbitrators.— It is to be observed that the conclusive presumptions in favor of jurisdiction which arise from recitals in domestic judgments are confined to collateral proceedings.¹ In a direct proceeding between the parties to the judgment the presumption in favor of regularity may be rebutted and it may be shown that the pretended record or judgment is in fact no record at all.² Thus in a direct proceeding to set aside a judgment it may be shown that the alleged service was fraudulent or that no service was actually made.³ The presumption

of regularity extends to the proceedings of *arbitrators*. It will be presumed in support of their award that they have proceeded regularly and acted fairly and that they have received all the testimony which was offered; and every reasonable intendment will be made in favor of their award.⁴

1, See sec. 636 *infra*.

2, Duncan v. Gerdine, 59 Miss. 550. See sec. 636 *infra*.

3, Newcomb v. Dewey, 27 Iowa 381; McNeill v. Edie, 24 Kan. 108; Bond v. Wilson, 8 Kan. 299; 12 Am. Rep. 466; Chambers v. Bridge Manufactory, 16 Kan. 270; Hanson v. Wolcott, 19 Kan. 207. Black Judg. sec. 288.

4, Browning v. Wheeler, 24 Wend. 258; 35 Am. Dec. 617; Rigden v. Martin, 6 Har. & J. (Md.) 403; Mayor v. Butler, 1 Barb. 325; Bullitt v. Musgrave, 3 Gill (Md.) 31; Yates v. Rissell, 17 Johns. 461; Maynard v. Frederick, 7 Cush. 247; Brower v. Kingsley, 1 Johns. Cas. 334; Blin v. Trimble, 2 Tyler (Vt.) 304; Short v. Pratt, 6 Mass. 496; Ackley v. Finch, 7 Cow. 290; Lamphire v. Cowan, 39 Vt. 420; Myers v. York Railway Co., 2 Curt. (U. S.) 28; Hayes v. Forskoll, 31 Me. 112; Davies v. Pratt, 17 C. B. 183; Strong v. Strong, 9 Cush. 560; Kendrick v. Tarbell, 26 Vt. 416; Parsons v. Aldrich, 6 N. H. 264; Henrickson v. Reinbach, 33 Ill. 299; Case v. Ferris, 2 Hill 75; Robertson v. McNeil, 12 Wend. 278; Chapin v. Broody, 25 N. H. 285; Joy v. Simpson, 2 N. H. 179; Dolph v. Clemens, 4 Wis. 181, as to presentment of claims; Robinson v. Hawkins, 38 Vt. 693, as to the taking and administering of an oath.

§ 35. Regularity of official acts.—The presumption of the regularity of official acts not only embraces judicial acts but those of other officers. Naturally the presumption has less weight and hence it is more easily rebutted when applied to acts in non-judicial

proceedings; but in each case the principle is the same, namely that, when an official act is shown to have been substantially regular, it is presumed that the formal requisites were also performed. Presumptions of this character are of constant application in a great variety of cases. Their weight varies greatly, depending on the length of time which has elapsed, the degree of the responsibility resting upon the officer, the extent to which he has been recognized as such by others and the nature of the acts themselves and in many cases these presumptions have no other effect than to determine the burden of proof. In a leading case Mr. Justice Story thus states the principle and the grounds on which the presumption rests and shows that it is not confined to official acts: "By the general rules of evidence presumptions are continually made in cases of private persons, of acts even of the most solemn nature, when those acts are the natural result or necessary accompaniment of other circumstances. In aid of this salutary principle the law itself, for the purpose of strengthening the infirmity of evidence and upholding transactions intimately connected with the public peace and the security of private property, indulges its own presumptions. It presumes that every man in his private and official character does his duty until the contrary is proved; it will presume that all things are rightly done un-

less the circumstances of the case overturn this presumption, according to the maxim, *omnia praesumuntur rite et solenniter esse acta donec probetur in contrarium*. Thus it will presume that a man acting in a public capacity has been rightly appointed; that entries found in public books have been made by the proper officer; that, upon proof of title, matters collateral to that title shall be deemed to have been done; as, for instance, if a grant or feoffment has been declared on, attornment will be intended, and that deeds and grants have been accepted, which are manifestly for the benefit of the party." ¹

1, Bank of United States v. Dandridge, 12 Wheat. 64, 69. See note to Wood v. Chapin, 67 Am. Dec. 73.

§ 36. Presumption of authority from acting in official capacity.—It has long been held that due appointment to office may be presumed, until the contrary appears, from the fact that one has acted in an official capacity. In England the rule has been held applicable to masters in chancery, surrogates, sheriffs, under sheriffs, justices of the peace, constables and numerous other officers;¹ and indeed is said to extend to all public officers. The same rule applies though the action be in the name of the officer, or though the title be directly put in issue by the pleading, or though the proceedings be criminal.² It would cause great inconvenience if, in

the first instance, strict proof were required of appointment or election to office in all cases where it might be only collaterally in issue, and it imposes no hardship in most cases to indulge the presumption that one assuming to be a public officer is not an intruder and violator of the law. Indeed, but for such a presumption, acting officers would find no protection in the discharge of public duties. In the United States the rule has been applied in a great variety of cases, a few of which will afford sufficient illustration. Thus proof that one has acted as collector of taxes,³ pound keeper,⁴ notary public,⁵ county commissioner,⁶ marshal,⁷ or attorney at law⁸ affords *prima facie* evidence of proper appointment or election and authority to act. And it will appear from the cases just cited that the rule applies with equal force when the action is by or against the officer, and when the officer is not a party.

1, *Marshall v. Lamb*, 5 Q. B. 115; *R. v. Verelst*, 3 Camp. 432; *Bunbury v. Matthews*, 1 Car. & K. 380; *Plumer v. Brisco*, 11 Q. B. 46; *Berryman v. Wise*, 4 T. R. 366; *Mechem Pub. Of. sec. 525*. As to the mode of appointment of officers, see sec. 204 *infra*.

2, *Cannell v. Curtis*, 2 Bing. N. C. 228; *Hayes v. Dexter*, 13 Ir. L. Rec. N. S. 22.

3, *Ronkendorff v. Taylor's Lessee*, 4 Peters 349; *Tucker v. Aiken*, 7 N. H. 113; *State v. Roberts*, 52 N. H. 492.

4, *Com. v. McCue*, 16 Gray 226, action of assault.

5, *Connoly v. Riley*, 25 Md. 402.

6, *Commissioners v. Anderson*, 20 Kan. 298; 27 Am. Rep. 171.

7, Killpatrick v. Frost, 2 Grant Cas. (Pa.) 168.

8, Attorneys being officers of the court their appearance in a case is *prima facie* evidence of authority, but the authority may be questioned by affidavit or otherwise on good cause being shown. McAlexander v. Wright, 3 B. Mon. (Ky.) 189; 16 Am. Dec. 93 and elaborate note. Osborn v. U. S. Bank, 9 Wheat. 738.

§ 37. Same subject—Not restricted to official appointments.—The presumption is not restricted to appointments of strictly public nature. It has been held to apply to constables and watchmen appointed by commissioners under a local act, and to trustees empowered by act of Parliament to raise money to build a church.¹ The same presumption has been applied where professional men as surgeons and attorneys have brought action for slander or libel in their professional capacity, although these cases may rest on the principle that the professional capacity of the plaintiff had been recognized or admitted in the defamatory language; and in such cases, if the professional capacity of the plaintiff is denied, there should be proof of appointment or of authority to act.² The same presumption of the authority to act exists respecting persons who act as attorneys. Said Chief Justice Marshall: "Certain gentlemen, first licensed by the government, are admitted by order of court, to stand at the bar with a general capacity to represent all suitors. The appearance of any one of

these gentlemen in a cause has always been received as evidence of his authority, and no additional evidence, so far as we are informed, has ever been required. This practice, we believe, has existed from the first establishment of our courts, and no departure from it has been made in those of any state or of the Union." ³ On this principle where a paper purporting to be a notice of election by a widow not to take under her husband's will, was found duly filed in the probate office, and the proof showed that the instrument bore her signature and had been filed by a reputable attorney, it was presumed that the attorney had the authority to file the same. ⁴

1, Butler v. Ford, 1 Crompt. & M. 662; Best Ev. sec. 357.

2, Berryman v. Wise, 4 T. R. 366; Collins v. Carnegie, 1 Adol. & Ell. 695; Pickford v. Gutch, 8 T. R. 305. See discussion of this subject, Tayl. Ev. sec. 173, 174, 175.

3, Osborn v. Bank, 9 Wheat. 738. See cases cited in the next note also.

4, Beem v. Kimberly, 72 Wis. 343; Field v. Proprietors, 1 Cush. 11; Tally v. Reynolds, 1 Ark. 99; 31 Am. Dec. 737; Penobscot Boom Co. v. Lamson, 16 Me. 224; 33 Am. Dec. 656. When an attorney appears and commences an action, he is presumed to have authority, McAlexander v. Wright, 3 B. Mon. 189; 16 Am. Dec. 93 and note.

§ 38. Performance of official duty.—
The maxim, *omnia praesumuntur rite et solenniter esse acta*, does not depend alone on the ground that the official act is performed

by an officer who has taken the oath of office, though undoubtedly this is one of the considerations which support the presumption of regularity in such cases; and we find the statement constantly recurring in judicial decisions that sworn public officials are presumed to have properly performed their duties in the absence of evidence to the contrary.¹ The presumption has been applied to acts of officers of almost every class, and a few illustrations will sufficiently illustrate the rule. Thus where a clerk of the federal court had no authority to administer the oath out of court, and the petition and schedules of a bankrupt purported to be verified by such clerk, the oath was presumed to have been taken in court.² Surveys made by public officers, having the appearance of regularity, are *prima facie* correct, as such officers are presumed to understand their duties and to have performed them.³ The presumption is frequently extended to the official acts of sheriffs and similar officers;⁴ thus that a sale by a sheriff under execution, was at the time and place required by law;⁵ that he was rightfully in possession of property levied on by him;⁶ that the recitals of a return are correct;⁷ that before an execution sale, a levy⁸ and notice of sale⁹ had been made; that a sheriff's deed was executed in due form when it is shown that there was an execution, sale, order of confirmation and

corroborating testimony as to the custom in such cases,¹⁰ and that where an execution was found with the proper depository some years after a levy, the same had been properly returned.¹¹ As further illustrations, it has been held that the rule applies to the acts of attorneys and notaries,¹² assessors,¹³ clerks of court,¹⁴ recording officers,¹⁵ constables¹⁶ and to the military and fiscal officers of the United States.¹⁷ The court will also presume that public officers in the exercise of their duties have been duly sworn;¹⁸ that a patent appearing regular on its face was executed by the proper officer;¹⁹ that a register of deeds, before recording a deed, had evidence of the official character of the justice before whom the same was acknowledged,²⁰ and that a deposition, purporting to have been taken and subscribed by a magistrate, was so taken and that the signature is genuine.²¹

1, *Squier v. Stockton*, 5 La. An. 120; 52 Am. Dec. 583; *Far v. Sims*, Rich. Eq. Cas. (S. C.) 122; 24 Am. Dec. 396; *Templeton v. Morgan*, 16 La. An. 438; *Ross v. Reed*, 1 Wheat. 482; *Hickman v. Boffman*, Hardin (Ky.) 348.

2, *Schermerhorn v. Talman*, 14 N. Y. 93.

3, *Ashe v. Lanham*, 5 Ind. 434; *Findley v. McCormick*, 50 Ind. 19; *Trotter v. President*, 9 Mo. 69; *Harris v. Burcham*, 1 Wash. C. C. 191; *Baeder v. Jennings*, 40 Fed. Rep. 199.

4, *Shorey v. Hussey*, 32 Me. 579; *Conwell v. Watkins*, 71 Ill. 488; *Curtis v. Herrick*, 14 Cal. 117; *Cooper v. Granberry*, 33 Miss. 117; *Hartwell v. Root*, 19 Johns. 345; *Hefner v. Hesse*, 29 La. An. 149; *Sadler v. Anderson*, 17 Tex. 245.

- 5, *Howard v. North*, 5 Tex. 290; 51 Am. Dec. 769.
- 6, *Wafer v. Pratt*, 1 Rob. (La.) 41; 36 Am. Dec. 581.
- 7, *Morse v. McCall*, 13 La. An. 215; *Case v. Colston*, 1 Met. (Ky.) 145.
- 8, *Smith v. Hill*, 22 Barb. 656.
- 9, *Culbertson v. Milhollin*, 22 Ind. 362.
- 10, *Armstrong v. McCoy*, 8 Ohio 128; 31 Am. Dec. 435.
- 11, *Conwell v. Watkins*, 71 Ill. 488.
- 12, *Pennington v. Yell*, 11 Ark. 212; 52 Am. Dec. 262.
- 13, *Perkins v. Nugent*, 45 Mich. 156.
- 14, *Niantic Bank v. Dennis*, 37 Ill. 381; *Craig v. Adair*, 22 Ga. 373.
- 15, *Rollins v. Wright*, 93 Cal. 395; *Collins v. Valleau*, 79 Iowa 626.
- 16, *Richardson v. Smith*, 1 Allen 541.
- 17, *United States v. Crusell*, 14 Wall. 1.
- 18, *Nelson v. People*, 23 N. Y. 293.
- 19, *Parkinson v. Bracken*, 1 Pinn. 174; 39 Am. Dec. 296.
- 20, *Forsaith v. Clark*, 21 N. H. 409.
- 21, *Bullen v. Arnold*, 31 Me. 583.

§ 39. **Same — Acts of municipal officers.**— On the same principle this presumption of regularity is extended to the acts of the officers of municipal corporations. Thus an ordinance will be presumed to have been passed by unanimous vote, if such vote be requisite to its enactment; and it will be presumed that the usual formalities have been complied with ;¹ that an adjournment of a meeting was regularly made,² and that the city authorities have complied with the formalities of law in making a contract.³ If the town record states that certain officers were elected,

the presumption is that the election was in the legal mode, as by ballot, if that was necessary.⁴ If a school district or municipal corporation has maintained its existence for many years, it will be presumed to have been regularly organized.⁵ So it will be presumed that a town has the number of officers required by law until the contrary appears, and that the acts of a part of the town officers are with the consent of the others.⁶ The principle under discussion was applied in a late case in the supreme court of the United States. In an action on municipal bonds it appeared that an election had been held, that the votes cast had been canvassed by the proper officers and an order made by the county court for a subscription in accordance with the terms of the order for the election. From these facts it was held a proper presumption that due notices of the election had been given on the ground that where an act is done which can be done legally only after the performance of some prior act, proof of the latter carries with it a presumption of the due performance of the prior act.⁷

1, *City of Louisville v. Hyatt*, 2 B. Mon. (Ky.) 177; 36 Am. Dec. 594; *In re Board of Rapid Transit Commissioners*, 18 N. Y. S. 320; *City of Duluth v. Krupp*, 46 Minn. 435.

2, *Freeholders v. State*, 24 N. J. L. 718. But see *Schott v. People*, 89 Ill. 195.

3, *New Orleans v. Halpin*, 17 La. An. 185; *Jackson School Township v. Hadley*, 59 Ind. 534.

4, *Mussey v. White*, 3 Me. 290.

5, *Jameson v. People*, 16 Ill. 257; 63 Am. Dec. 304; *Bassett v. Porter*, 4 Cush. 487; *Sherwin v. Bugbee*, 11 Vt. 439; *People v. Farnham*, 35 Ill. 562; *People v. Maynard*, 15 Mich. 463; *New Boston v. Dunbarton*, 12 N. H. 409; *Robie v. Sedgwick*, 35 Barb. 319.

6, *Downing v. Rugar*, 21 Wend. 178; 34 Am. Dec. 223.

7, *Knox County v. Ninth National Bank*, 147 U. S. 91.

§ 40. **Other illustrations and limitations upon the rule.**—“If a person acts notoriously as the officer of a corporation, and is recognized by it as such officer, *a regular appointment will be presumed*; and his acts will bind the corporation, although no written proof is or can be adduced of his appointment.”¹ In like manner it will be presumed that acts, printed in the usual manner among the public laws and purporting to be legislative acts, have been regularly passed;² that public officers, the custodians of public documents, have performed their duty by keeping and preserving them,³ and from this follows the presumption that, when papers are directed by law to be kept in a certain office and cannot be there found, they never existed.⁴ On the same principle interlineations or changes made in a public record are presumed to have been made by the officer having the custody thereof or by some one duly authorized.⁵ But the presumption that an officer has done his duty must be limited to his official acts. This was illustrated in the case of a constable who distrained and

sold goods under a landlord's warrant; it was held that there was no presumption of regularity, as in this proceeding he was acting as the mere agent of the landlord and not as an officer.⁶ Nor will it be presumed that the officer is in default upon the presumption that the other party has performed his duty.⁷ Although as we have seen from the illustrations already given, courts will often dispense with proof of incidental or intermediate facts which generally precede or accompany official acts, the presumption under discussion is not *a substitute for wholly independent and material facts* having no necessary connection with such official acts. Thus when it was proved that property was captured by a military officer and sent forward by him, and that there was an unclaimed fund in the treasury derived from sales of property of the same kind as that captured, the court could not presume as a matter of law that the property was delivered by the military officer to a treasury agent and that it was sold by him and that the proceeds were covered into the treasury.⁸ Another important qualification is that where an officer acts under a *naked statutory power* with a view to divest, upon certain contingencies, the title or right of a citizen, as in the case of a *sale of lands for taxes* or its seizure under the right of *eminent domain*, the regularity of proceedings will not be presumed, but it is incumbent upon the person

claiming by virtue of them to show that every preliminary step required by law has been taken.⁹ To the general rules under discussion should be added the qualification that *if a public officer is sued for misconduct* there is no presumption in his favor sufficient to outweigh preponderating proof to the contrary, but only such a one as to throw upon those who impugn his conduct the burden of establishing their charge.

1, Dill. Mun. Corp. sec. 213; *United States Bank v. Dandridge*, 12 Wheat. 64; *Kiley v. Forsee*, 57 Mo. 390.

2, *Illinois Central Ry. Co. v. Wren*, 43 Ill. 77; *Bedard v. Hall*, 44 Ill. 91; *People ex rel. Barnes v. Starne*, 35 Ill. 121; 85 Am. Dec. 348 and elaborate note. For mode of determining whether a statute was legally enacted see sec. 118 *infra*.

3, *Hemingway v. State*, 68 Miss. 371.

4, *Hall v. Kellogg*, 16 Mich. 135; *Morrill v. Douglass*, 14 Kan. 293.

5, *Hommell v. Devinney*, 39 Mich. 522.

6, *Murphy v. Chase*, 103 Pa. St. 260.

7, *Weimer v. Bamburg*, 30 Mich. 201.

8, *United States v. Ross*, 92 U. S. 281.

9, *Keane v. Cannovan*, 21 Cal. 291; 82 Am. Dec. 738; *Williams v. Payton*, 4 Wheat. 77; *McClung v. Ross*, 5 Wheat. 116; *Thatcher v. Powell*, 6 Wheat. 119; *Jackson v. Shepard*, 7 Cow. 88; 17 Am. Dec. 502; *Sharp v. Johnson*, 4 Hill 92; 40 Am. Dec. 259; *Polk v. Rose*, 25 Md. 153; 89 Am. Dec. 773; *Martin v. Rushton*, 42 Ala. 289; *Nichols v. Bridgeport*, 23 Conn. 189; 60 Am. Dec. 636.

§ 41. **Statutory presumptions of this class.**—Presumptions in favor of the regularity of official acts are frequently created by

statute. Thus in the various jurisdictions statutes will be found providing that a *tax deed* duly witnessed and acknowledged shall be presumptive evidence of the regularity of all the proceedings from the valuation of the lands by the assessor up to and including the execution of the deed. So statutes are frequently enacted providing that former *acknowledgments* of deeds, taken in other states of lands within the jurisdiction, shall be presumed to have been taken in conformity to law; and that orders of the proper officers *laying out highways* are presumptive evidence of notice and of regularity of former proceedings. Equally important illustrations of such legislation will be found in numerous statutes in the several states which provide that *judicial sales* shall be presumed to have been regular after the lapse of time or after proof has been made of certain jurisdictional facts. These statutes are of special importance in supporting titles depending upon proceedings in courts of probate. No attempt will be made to enumerate the statutes of the several states creating these and similar presumptions, but it is left with the practitioner to consult the statutes and decisions of the jurisdiction.

§ 42. Presumptions of regularity in unofficial acts—In general.—Gradually the presumption that officials obey the mandates of the law and perform their duties has

been extended to include to some extent the acts of private persons as well in the transaction of affairs of business. Courts have sanctioned the presumptions which will be mentioned in the following sections on the grounds that men are presumed to have acted legally and properly rather than otherwise, and that it is reasonable to assume that the usual and customary modes of business have been adopted in given cases, until some departure from the regular mode has been shown. But it is evident from the very statement of the considerations which have influenced the courts to adopt presumptions of this class that such presumptions are far from conclusive and that they must be received with caution, yet they have been applied to an infinite variety of cases, sometimes being entitled to considerable weight, in others to very little; generally their chief importance is to determine the burden or order of proof.

§43. Same as to negotiable paper.—Presumptions of this character are perhaps most frequently indulged in in respect to negotiable paper. It is presumed that such paper was regularly issued for a valuable consideration, and that the payee or the one who has purchased it before maturity is a *bona fide* holder and entitled to recover the full amount.¹ But if the defendant can show that the note was originally obtained by duress; secured through fraud, or that it

was lost or stolen, the burden is changed, and the presumption then arises that the guilty person will part with the instrument for the purpose of enabling some third party to recover for his benefit.² There is also a presumption that an endorsement, made by a payee or endorsee without date, was before maturity and that the holder acquired the note or bill before maturity, and in the absence of proof the endorsement will be presumed to have been at the time of execution of the note³ and at the place where the instrument is dated,⁴ and a bill of exchange is presumed to have been accepted before maturity and within a reasonable time after its date.⁵ The holder of a note payable to bearer is presumed to be the owner.⁶ The drawee of a check is presumed to know the signature of the drawers.⁷ When a party draws a check on a bank which is paid, it is not presumed to have been for the payment of a debt to the bank but that it was drawn against funds of the drawer.⁸ Payment of a note is presumed from its possession by the maker.⁹ The execution and delivery of a note raises the presumption of a settlement of accounts previous to its date.¹⁰ Where several persons sign a note they are presumed to be equally liable.¹¹

1, 1 Dan. Neg. Inst. sec. 812; 1 Pars. Notes & B. 187; *Dickerson v. Burke*, 25 Ga. 225; *Wilson v. Lazier*, 11 Gratt. 477; *Clarke v. Schneider*, 17 Mo. 295; *Poorman v. Mills*, 35 Cal. 118. See full note, 17 L. R. A. 326.

2, 1 Pars. Notes & B. 189; *Bailey v. Bidwell*, 13 M. & W. 73; *Edmonds v. Groves*, 2 M. & W. 642; *Bingham v. Stanley*, 2 Q. B. 117; *Wyat v. Bulmer*, 2 Esp. 538; *First National Bank v. Green*, 43 N. Y. 298; *Knight v. Pugh*, 4 Watts & S. (Pa.) 445; 39 Am. Dec. 99; *Brown v. Street*, 6 Watts & S. (Pa.) 221.

3, 1 Dan. Neg. Inst. sec. 728; *Mobley v. Ryan*, 14 Ill. 51; 56 Am. Dec. 488; *Ranger v. Carey*, 1 Met. 369; *Pettis v. Westlake*, 3 Scam. 535; *Walker v. Davis*, 33 Me. 516; *McDowell v. Goldsmith*, 6 Md. 319; 61 Am. Dec. 305; *Hopkins v. Kent*, 17 Md. 113; *Smith v. Nevin*, 89 Ill. 193; *New Orleans, &c. v. Montgomery*, 95 U. S. 16; *Cripps v. Davis*, 12 M. & W. 165; *Snyder v. Oatman*, 16 Ind. 265; *Pinkerton v. Bailey*, 8 Wend. 600; *Mason v. Nooman*, 7 Wis. 510; *Colburn v. Averill*, 30 Md. 310; 50 Am. Dec. 630. Contra, *Ruddell v. Landers*, 25 Ark. 238; 94 Am. Dec. 719; *Clendenin v. Southerland*, 31 Ark. 20. The rule is otherwise as to non-negotiable paper, *Barrick v. Austin*, 21 Barb. 241.

4, Tied. Com. Pap. sec. 506; *Lemig v. Ralston*, 23 Pa. St. 139. See extended note, 17 L. R. A. 328.

5, *Roberts v. Bethell*, 12 C. B. 778. For extended note as to liability of a stranger who endorses commercial paper before delivery, see 18 L. R. A. 33.

6, *Stoddard v. Burton*, 41 Iowa 582.

7, *Redington v. Woods*, 45 Cal. 406.

8, *White v. Ambler*, 8 N. Y. 170; Tied. Com. Pap. sec. 433.

9, 2 Dan. Neg. Inst. sec. 1228; *Gray v. Gray*, 2 Lans. 173; *Potts v. Coleman*, 67 Ala. 221; *Lipscomb v. De Lemos*, 68 Ala. 592; *Hollenberg v. Lane*, 47 Ark. 394; *Callahan v. Bank*, 82 Ky. 231; *Tuskaloosa Oil Co. v. Perry*, 85 Ala. 158; *Turner v. Turner*, 79 Cal. 565. The rule is the same as to a note with the name torn off, *Powell v. Swan*, 5 Dana (Ky.) 1. Or as to a due bill, *Tedens v. Schumers*, 112 Ill. 263.

10, *Copeland v. Clark*, 2 Ala. 388; *Campbell v. Hays*, 1 Ind. 547; *De Freest v. Bloomingdale*, 5 Den. 304.

11, *Orvis v. Newell*, 17 Conn. 97.

§ 44. **Presumptions that documents have been duly executed.**—It is a rule of general application that documents regular on their face are presumed to have been properly executed and to have undergone all formalities essential to their validity.¹ Thus it will be presumed that the maker of an instrument executed it before the witness signed,² and that a document purporting to be witnessed was witnessed at the time of its execution.³ When different deeds and leases are made bearing date on the same day and the order of the execution does not appear, it will be presumed that they were made in the *proper order* and to carry out the obvious intent of the parties.⁴ "But independent proof of the correctness of the date will be required if the circumstances are such that collusion as to the date might be practiced, and would, if practiced, injure any person, or defeat the objects of any law."⁵ If after notice to produce, secondary evidence is offered of a document which must have been stamped in order to be legal, the presumption is that it was *duly stamped*.⁶ The rule is the same where secondary evidence is given of a lost instrument⁷ or of notice of protest, the contents not being proved.⁸ It is an application of the same principle that when a contract which should be in writing under the statute of frauds is declared to have been duly made it will be presumed to be in writing.⁹ So where

a deed is duly signed, attested and witnessed there arises a presumption of *sealing and delivery*;¹⁰ and the time of its execution and delivery is presumed to be on the day of its date.¹¹ And where a power of attorney to make a deed is shown to have been executed, it is presumed that the trust reposed in the attorney was executed in good faith.¹² In like manner, delivery and acceptance and knowledge of contents are presumed after due acknowledgment and recording.¹³ And where a mortgage for purchase money was regular, it was presumed that a lost deed executed at the same time was also regular.¹⁴ On the same principle *recitals* in ancient documents of former documents have been held presumptive evidence of their existence.¹⁵ And where an attested copy of a deed from its registry is introduced as evidence bearing a scroll and the word seal written upon it in a place where the seal is usually placed, it will be presumed that the original was properly sealed.¹⁶ And if a *will purports to have been duly signed, attested and witnessed*, on proof of execution the court will presume, in the case of the death of the witnesses or in case they do not remember the facts connected with its execution, that the law was complied with;¹⁷ and the details of the statutory requirements will be presumed, whether it is so stated in the attestation clause or not, unless the contrary is proven.¹⁸

1, *Clements v. Machebouef*, 92 U. S. 418; *Freeman v. Thayer*, 33 Me. 76; *Sadler v. Anderson*, 17 Tex. 245; *Diehl v. Ewing*, 65 Pa. St. 320; *Roberts v. Pillow*, 12 Ark. 822. It is presumed that the local law of the place of execution has been complied with, 19 Am. & Eng. Ency. Law 51, and cases cited.

2, *Hughes v. Debnom*, 8 Jones (N. C.) 127.

3, *Pringle v. Dunn*, 37 Wis. 449.

4, *Dudley v. Cadwell*, 19 Conn. 218; *Taylor v. Horde*, 1 Burr. 106; *Barker v. Keete*, 1 Freem. 250; *Steph. Ev.* art. 85.

5, *Steph. Ev.* art. 85. See also *Houliston v. Smith*, 2 Car. & P. 24.

6, *Crisp v. Anderson*, 1 Stark. 35.

7, *Marine Investment Co. v. Havaside*, 5 L. R. H. L. Cas. 624; *Thayer v. Barney*, 12 Minn. 502.

8, *Burgess v. Vreeland*, 2 Zab. (N. J.) 71; 59 Am. Dec. 408.

9, *Printup v. Johnson*, 19 Ga. 75; *Coles v. Bowne*, 10 Paige 526.

10, *Ball v. Taylor*, 1 Car. & P. 417; *Hall v. Bainbridge*, 12 Q. B. 699; *Grellier v. Neale*, 1 Peake 199; *Tulbat v. Hodson*, 7 Taunt. 251. But in this country if the original deed has no seal in such manner as to be valid under the law of the state the fact that there is a recital of sealing is not sufficient, *State v. Humbird*, 54 Md. 327; *Chilton v. People*, 66 Ill. 501.

11, *Hardin v. Crate*, 78 Ill. 533; *Smiley v. Fries*, 104 Ill. 416.

12, *Clements v. Machebouef*, 92 U. S. 418.

13, *Warren v. President*, 15 Ill. 236; 58 Am. Dec. 610; *Rushin v. Shields*, 10 Ga. 636; 56 Am. Dec. 436; *Blight v. Schenck*, 10 Pa. St. 285; 51 Am. Dec. 478.

14, *Godfroy v. Disbrow*, Walk. (Mich.) 260.

15, *Fuller v. Saxton*, 20 N. J. L. 61.

16, *Deininger v. McConnell*, 41 Ill. 228.

17, *Burgoyne v. Showler*, 1 Rob. Ecc. 5; *Brenchley v. Still*, 2 Roberts 162; *Thomson v. Hall*, 2 Roberts 426; *Reeves v. Lindsay*, 1 R. 3 Eq. 509; *Hughes v. Hughes*, 31 Ala. 519; *Auburn Seminary v. Calhoren*, 25 N. Y. 422. But see *Croft v. Croft*, 4 Swab. & T. 10.

18, *Deupree v. Deupree*, 45 Ga. 415; *Fatheree v. Lawrence*, 33 Miss. 585; *Croft v. Pawlet*, 2 Str. 1109; *Eliot v. Eliot*, 10 Allen 357; *Barnes v. Barnes*, 66 Me. 286; *Chaffee v. Convention*, 10 Paige 85; 40 Am. Dec. 225, and note; *In re Johnson*, 2 Curt. (U. S.) 341; *Blocher v. Hostetter*, 2 Grant Cas. (Pa.) 288.

§ 45. Dates, when presumed correct.—

It is on the same principle that dates in written instruments are presumed to be correct, and that such instruments are presumed to have been executed at the time indicated by the date they bear. It is doubtless true that in the great majority of cases the date of the instrument and the time of its execution are the same, hence the inference may be fairly drawn until the contrary is proven. This rule has been applied to deeds,¹ assignments,² mortgages,³ receipts of payment,⁴ notes, bills and endorsements,⁵ letters,⁶ agreements⁷ and legal processes.⁸ But it has been held that the rule does not apply when a deed is offered to support an action against one who is neither a party nor privy to it;⁹ and in respect to *forged instruments* there is no presumption of delivery on the day of the date or at any particular time.¹⁰ And although dates in written instruments are presumed correct they do not afford any pre-

sumption of the truth of *collateral facts*, as of the presence of the alleged signers at the time and place the instrument purports to have been made.¹¹

1, *Smith v. Porter*, 10 Gray 66; *Costigan v. Gould*, 5 Den. 290; *Pullen v. Hutchinson*, 25 Me. 242; *People v. Snyder*, 41 N. Y. 397, as to the presumption of delivery on the day of date.

2, *Byrd v. Tucker*, 3 Ark. 451.

3, *Merrill v. Dawson*, Hemp. (U. S.) 563.

4, *Caldwell v. Gamble*, 4 Watts (Pa.) 292.

5, *Kinsley v. Sampson*, 100 Ill. 573; *Claridge v. Klett*, 15 Pa. St. 255; *Taylor v. Snyder*, 3 Den. 145; 45 Am. Dec. 457. See sec. 43 *supra*.

6, *Anderson v. Weston*, 6 Bing. N. C. 296; *Pullen v. Hutchinson*, 25 Me. 249; *Abroms v. Pomeroy*, 13 Ill. 133; *Breck v. Cole*, 4 Sandf. 79. But see *Butler v. Mountgarret*, 7 H. L. Cas. 647. It has been held that this rule is not applicable to letters between husband and wife where there might be motive for collusion, *Houlston v. Smyth*, 2 Car. & P. 24. Nor does it apply to transactions between petitioning creditors and a bankrupt when the same motive might exist, *Hoare v. Coryton*, 4 Taunt. 560; *Wright v. Lainson*, 2 M. & W. 739. Contra, *Sinclair v. Baggaley*, 4 M. & W. 312; *Taylor v. Kinloch*, 1 Stark. 175. Before the presumption can arise there should be proof that the letter has been written and received, *Smiths v. Shoemaker*, 17 Wall. 630.

7, *Sinclair v. Baggaley*, 4 M. & W. 312.

8, *Day v. Lamb*, 7 Vt. 426; *Lyle v. Bradford*, 7 Mon. (Ky.) 111; *Bunker v. Shed*, 8 Met. 150.

9, *Baker v. Blackburn*, 5 Ala. 417. But see *Potez v. Glossip*, 2 Exch. 191.

10, *Remington Co. v. O'Dougherty*, 81 N. Y. 474.

11, *Given v. Albert*, 5 Watts & S. (Pa.) 333.

§ 46. Presumptions as to the mailing and receipt of letters. — Other presumptions of the same general character arise from the well known and uniform methods of transacting business. One ground for such presumption may be the difficulty of furnishing exact proof of the fact desired to be proved. Thus if an envelope bears a post-mark it is presumed that the letter enclosed was in the post on the date of the post-mark;¹ that it was sent on that day,² and that letters, delivered at the post office or to the postman duly stamped and addressed to one at his place of residence, have been received by him by the due course of the mail.³ Of course this presumption is open to rebuttal, and it has been held in several cases that no legal presumption of the *receipt* of a letter arises from the fact that it has been mailed to a person at his place of residence; that while the due mailing of the letter creates no such legal presumption, it is a fact from which the jury may presume that the letter duly reached its destination. Said Justice Brewer: "This presumption which is not a presumption of law, but one of fact, is based on the proposition that the post office is a public agency charged with the duty of transmitting letters; and on the assumption that what ordinarily results from the transmission of a letter through the post office probably resulted in the given case. It is a probability resting

on the custom of business and the presumption that the officers of the postal system discharged their duty. But no such presumption arises unless it appears that the person addressed resided in the city or town to which the letter was addressed."⁴ In other cases it has been held that no presumption of this kind arises where an ordinary letter is addressed to a post office at which there is *no mail delivery*.⁵ The delivery may be at the post office or at another depository from which the proof shows the letters to be regularly delivered, or it may be to a clerk whose regular business it is to deliver such letters, the essential fact being that such a regular general course of business is established that the inference sought may be fairly drawn in the special case.⁶ Where a letter is received *purporting to be an answer* to one which has been duly mailed to a person at his place of residence this fact creates a presumption that the answer is genuine.⁷ The presumption or inference that letters have been *sent from a private office* may arise when it is shown by the testimony of a clerk or otherwise that it is the regular practice to carry the letters to the post office or to mail them in a certain manner. After such proof the presumption of the mailing arises although the witness has no recollection that in the given case the letter was mailed.⁸

1, United States v. Noelke, 7 Blatchf. 554. Contra, Sherburne Falls Bank v. Townsley, 102 Mass. 177.

2, *New Haven Company Bank v. Mitchell*, 15 Conn. 206; *Rosenthal v. Walker*, 111 U. S. 185.

3, *Austin v. Holland*, 69 N. Y. 571; *Oregon Steamship Co. v. Otis*, 100 N. Y. 446; *Briggs v. Hervey*, 130 Mass. 186; *Breed v. Central City Bank*, 6 Col. 235; *Stocken v. Collin*, 7 M. & W. 515; *Skilbeck v. Garbett*, 7 Q. B. 846; *Dunlop v. Higgins*, 1 H. L. Cas. 381; *Linderburger v. Beall*, 6 Wheat. 103; *Russell v. Beckley*, 4 R. I. 525; *Starr v. Torrey*, 22 N. J. L. 190; *Shoemaker v. Bank*, 59 Pa. St. 79; *German National Bank v. Burns*, 12 Cal. 539; 13 Am. St. Rep. 247. See also, *Phelan v. Northwestern Life Insurance Co.*, 113 N. Y. 147; 10 Am. St. Rep. 441 and note; *Powell Ev.* (4th. ed.) 86; 1 Tayl. Ev. 197.

4, *Henderson v. Carbondale Coal & Coke Co.*, 140 U. S. 25, 37; *First National Bank v. McManigle*, 69 Pa. St. 159; *United States v. Babcock*, 3 Dill. (U. S.) 571; *Schutz v. Jordan*, 141 U. S. 213, 219.

5, *Bilgerry v. Branch*, 19 Gratt. 393; *James v. Wade*, 21 La. An. 548; *Henderson v. Carbondale Coal & Coke Co.*, 140 U. S. 25.

6, *Macgregor v. Kelly*, 3 Exch. 794; *Skilbeck v. Garbett*, 7 Q. B. 846; *Dana v. Kemble*, 19 Pick. 112; *Thalkheimer v. Brinckerhoff*, 6 Cow. 90; *Hagedorn v. Reid*, 3 Camp. 377. *Contra*, *Hetherington v. Kemp*, 4 Camp. 193.

7, *Walter v. Haynes*, Ryan & M. 149; *Com. v. Bradish*, 14 Mass. 296. The address must be substantially correct in order to create this presumption, see above cases; and there should be proof of the place of mailing and the course of the mail, *Boon v. State Insurance Co.*, 37 Minn. 426; *Wiggins v. Burkham*, 10 Wall. 129; *Phelan v. Northwestern Life Insurance Co.*, 113 N. Y. 147; 10 Am. St. Rep. 441 and note.

8, See sec. 47 *infra*.

§ 47. Same — Telegrams — Weight of the presumption.— On proper preliminary proof similar presumptions may arise as to the sending and delivery of a telegram.¹

One of the considerations which have been urged in favor of the presumption as to the due receipt of letters is the fact that the post office is managed by sworn government officers who are in the discharge of public duties.² While this is not true of the officials and agents of telegraph companies, those companies are regulated in their business by public law and severe penalties are frequently imposed for abuse of the confidence, and doubtless the instances in which messages properly directed and intrusted to their care are not delivered, are comparatively rare. Upon considerations of this kind it was held by the court of appeals of New York that "upon proof of delivery of the message for the purpose of transmission, properly addressed to the correspondent at his place of residence or where he was shown to have been, a presumption of fact arises that the telegram reached its destination, sufficient at least to put the other party to his denial and to raise an issue to be determined."³ The weight to be given to the presumption now under discussion will of course depend very much upon the preliminary proof which may be given as to the course of business. The business of a public officer may be so systematically conducted that very considerable weight should be given to the presumption; on the other hand it may be so carelessly managed that any presump-

tion of regularity must be very unsatisfactory and very easily rebutted.

1, *Com. v. Jeffries*, 7 Allen 548; 83 Am. Dec. 712; *Oregon Steamship Co. v. Otis*, 100 N. Y. 446; 53 Am. Rep. 221. Contra, *Howley v. Whipple*, 48 N. H. 488. As to proof of telegrams see sec. 209 *infra*.

2, *Oregon Steamship Co. v. Otis*, 100 N. Y. 451; 53 Am. Rep. 221.

3, *Oregon Steamship Co. v. Otis*, 100 N. Y. 446; 53 Am. Rep. 221. As to telephone communications, see *Sullivan v. Kuykendall*, 82 Ky. 483; 56 Am. Rep. 901. See sec. 210 *infra*.

§ 48. Presumptions arising from partnership dealings. — Other presumptions arise out of the customary and well-known methods of partnership dealings. Thus, as between partners, each partner is presumed to have *knowledge of the partnership books*, and the books are presumed to be correct; hence it is not necessary to show knowledge of particular entries on the part of the partner.¹ Of course this presumption is disputable and little more than a mere inference of fact and may be rebutted by proof that the partner sought to be charged had no actual knowledge or no opportunity for inspection or examination of the books.² In the absence of any agreement or evidence showing the contrary there is a presumption that the partners are *equally interested* both in the capital and the profits.³ So they are presumed liable to the payment of losses in the same proportion that they are entitled to share the profits.⁴ Where

several persons carry on the same business together they are presumed to be partners.⁵ And for stronger reason when several persons participate in the profits of a business a *partnership is presumed*.⁶ And in those cases where each partner has the right to sign the firm name to commercial paper it will be presumed, when the firm name so appears, that it is signed regularly by authority, and for the purposes of the firm; and the burden of proof is placed upon the partners to show the contrary.⁷ This presumption will be rebutted by proof that the instrument was given upon other than partnership transactions or in some transaction beyond the scope of the partnership.⁸

1, *Desha v. Smith*, 20 Ala. 747; *Haller v. Williamowicz*, 23 Ark. 566; *Hale v. Brennan*, 23 Cal. 511; *Pond v. Clark*, 24 Conn. 370; *Stuart v. McKitchan*, 74 Ill. 122; *Cunningham v. Smith*, 11 B. Mon. (Ky.) 325; *Parker v. Jonte*, 15 La. An. 290; *Topliff v. Jackson*, 12 Gray 565; *Allen v. Coit*, 6 Hill 318; *Fairchild v. Fairchild*, 64 N. Y. 471; *Boire v. McGinn*, 8 Ore. 466.

2, *United States Bank v. Binney*, 5 Mason 176; *Wheatley v. Wheatley*, 34 Md. 62; *Piano Co. v. Bernard*, 2 Lea 358; *Saunders v. Duval*, 19 Tex. 467; *Layton v. Hall*, 25 Tex. 204.

3, *Farr v. Johnson*, 25 Ill. 522; *Gould v. Gould*, 6 Wend. 263; *Laylor v. Taylor*, 2 Murph. (N. C.) 70; *Conwell v. Sandidge*, 5 Dana (Ky.) 210; *Jones v. Jones*, 1 Ired. Eq. 332; *Honore v. Colmesnil*, 1 Marsh. J. J. (Ky.) 506; *Turnipseed v. Goodwin*, 9 Ala. 372; *Donelson v. Posey*, 13 Ala. 752; *Logan v. Dixon*, 73 Wis. 533; *Roach v. Perry*, 16 Ill. 37; *Harris v. Carter*, 147 Mass. 313. *Contra*, *Peacock v. Peacock*, 2 Camp. 45.

4, 1 Lindley Part. sec. 385; In re Albion Life Assurance Society, 16 Ch. D. 83; Robinson's Executors Case, 6 De Gex, M. & G. 572.

5, McMillan v. McKenzie, 2 G. Greene (Iowa) 368.

6, Ryder v. Wilcox, 103 Mass. 24; Parker v. Canfield, 37 Conn. 250; St. Louis Bank v. Attheimer, 91 Mo. 190; Cothram v. Marmaduke, 60 Tex. 370; Mifflin v. Smith, 17 Serg. & R. (Pa.) 165.

7, Le Roy v. Johnson, 2 Peters 186; Jones v. Rivers, 8 Ala. 11; Miller v. Hines, 15 Ga. 197; Gregg v. Fisher, 3 Ill. App. 261; Magill v. Merrie, 5 B. Mon. (Ky.) 168; Waldo Bank v. Greely, 16 Me. 419; Thurston v. Lloyd, 4 Md. 283; Bank v. Winship, 5 Pick. 11; Littell v. Fitch, 11 Mich. 525; Vallett v. Parker, 6 Wend. 615.

8, Mauldin v. Bank, 2 Ala. 502; Insurance Co. v. Bennett, 5 Conn. 574; 13 Am. Dec. 109; Bryan v. Tooke, 60 Ga. 437; Lucas v. Baldwin, 97 Ind. 471; Chenoweth v. Chamberlin, 6 B. Mon. (Ky.) 60; Eastman v. Cooper, 15 Pick. 276; 26 Am. Dec. 600; Butler v. Stocking, 8 N. Y. 408. Contra, Flemming v. Prescott, 3 Rich. (S. C.) 307; 45 Am. Dec. 766; First National Bank v. Carpenter, 34 Iowa 433.

§ 49. **Presumptions of regularity in acts of private corporations.**—The presumption of regularity is frequently extended to corporate acts. In a former section we discussed the proposition that persons who act in a public capacity as officers are presumed to have been regularly appointed or elected.¹ The same presumption obtains in respect to those who act publicly as the officers of private corporations; *prima facie* they will be deemed rightfully in office rather than intruders, and the requirements necessary to their appointment will be presumed to have been complied with.² So there is a presump-

tion that the officers of the corporation have *acted regularly*, for example, where the common seal of the corporation appears to be attached to an instrument and the signatures of the officers are proved, the seal is presumed to have been affixed by proper authority in those cases where the execution of the instrument would be ordinarily within the power of such officers.³ Acts purporting to be performed by a board of directors are presumed to have been the acts of a majority;⁴ so it is presumed that the meetings of the corporation were regularly held; that due notice was given, and that at such meeting a quorum was present.⁵ If it appears that the execution of a note was expressly authorized at a meeting of a board of directors, it will be presumed that the board was then rightfully in session;⁶ if the minutes state that certain officers were elected or other business transacted, it will be presumed that the requisite number of persons was present at the corporate meeting and that the business was properly transacted;⁷ and generally where agents or officers of the corporation are acting within the apparent scope of their powers, it will be presumed that their *acts are authorized by all necessary formalities*.⁸ The presumption is that the provisions of law have been complied with by the officers, not that they have been violated.⁹ Again the granting of a charter may be presumed from long

continued use of corporate franchises;¹⁰ so the acceptance of charters and beneficial grants may be presumed;¹¹ as well as the fact that all officers acquiesce who do not express their dissent.¹² And after a corporation has gone into operation and rights have been acquired under it, every reasonable presumption is indulged *in favor of its legal existence*.¹³ It is sufficient to establish the existence of the corporation *de facto* to show, "first, the existence of a charter, or some law under which a corporation with the powers assumed might lawfully be created; and second, a user, by the party to the suit, of the rights claimed to be inferred by such charter or law."¹⁴ There are numerous cases which hold that the mere transaction of business by officers without proof of an organization or an existing charter is not sufficient to raise a presumption of corporate existence.¹⁵ It is a familiar doctrine that, under the rules of pleading which generally prevail, associations acting as corporations as well as individuals dealing with such corporations *may be estopped to deny corporate existence*.¹⁶ It has often been held that, in proceedings where the corporation is not a party but where the question of incorporation arises incidentally, incorporation will be presumed from user and the exercise of corporate privileges and acts.¹⁷ It has even been held that, in proceedings for the *expulsion* of members after jurisdic-

tion is shown, it will be presumed that the proceedings were fair and regular.¹⁸ But, since the law abhors forfeitures, there will be no presumption in favor of regularity in proceedings to forfeit property or other valuable rights.¹⁹

1, Bank of United States v. Dandridge, 12 Wheat. 64. See sec. 36 *supra*.

2, Selma & Tenn. Ry. Co. v. Tipton, 5 Ala. 787; 39 Am. Dec. 344; Hilliard v. Goold, 34 N. H. 230; 66 Am. Dec. 765.

3, Canandarqua Academy v. McKechnie, 90 N. Y. 618; New England Iron Co. v. Gilbert Ry. Co., 91 N. Y. 153; Mickey v. Stratton, 5 Sawy. (U. S.) 475; Wood v. Whelan, 93 Ill. 153; Thorington v. Gould, 59 Ala. 401.

4, Despatch Line v. Bellamy Co., 12 N. H. 205; 37 Am. Dec. 203.

5, Sargent v. Webster, 13 Met. 497; 46 Am. Dec. 743.

6, Hardin v. Iowa Ry. Co., 78 Iowa 726.

7, Hathaway v. Addison, 48 Me. 440; Insurance Co. v. Sortwell, 8 Allen 223; Baile v. Educational Society, 47 Md. 117. But see Mayberry v. Mead, 80 Me. 27.

8, Sargeant v. Webster, 13 Met. 497; 46 Am. Dec. 743; Ashtabula Ry. Co. v. Smith, 15 Ohio St. 328; Lane v. Brainerd, 30 Conn. 565; Chouteau Ins. Co. v. Holmes, 68 Mo. 601; 30 Am. Rep. 807; Wells v. Rahway Rubber Co., 19 N. J. Eq. 402; McDaniels v. Flower Brook Co., 22 Vt. 274; Leavitt v. Oxford Mining Co., 3 Utah 265; Copp v. Lamb, 12 Me. 312.

9, Pringle v. Woolworth, 90 N. Y. 502; Chautauqua Co. Bank v. Risley, 19 N. Y. 369.

10, Selma & Tenn. Ry. Co. v. Tipton, 5 Ala. 787. For numerous illustrations of this subject see note, 22 L. R. A. 276.

11, Bank of United States v. Dandridge, 12 Wheat. 64.

12, *Morawitz Pri. Corp.* sec. 25.

13, *Duke v. Cahawba Co.*, 10 Ala. 82; 44 Am. Dec. 472.

14, *Methodist Church v. Pickett*, 19 N. Y. 482; *United States Bank v. Stearnes*, 15 Wend. 314.

15, *Clark v. Jones*, 87 Ala. 474; *Greene v. Dennis*, 6 Conn. 293; 16 Am. Dec. 58; *DeWitt v. Hastings*, 8 Jones & S. (N. Y.) 463; *United States Bank v. Stearnes*, 15 Wend. 314.

16, *Clifton Company v. Barnheisel*, 92 Ind. 88; *Lakeside Company v. Crane*, 80 Cal. 181; *Skinner v. Richardson*, 76 Wis. 464. But see *Bennington Co. v. Rutheford*, 18 N. J. L. 105; 35 Am. Dec. 528.

17, *United States v. Amedy*, 11 Wheat. 392; *People v. Hughes*, 29 Cal. 257; *Calkins v. State*, 18 Ohio St. 366; 98 Am. Dec. 121.

18, *Bachmann v. N. Y. Arbeiter*, 64 How. Pr. (N. Y.) 442; *Harmon v. Dreher*, 1 Spear Eq (S. C.) 87; *Shannon v. Frost*, 3 B Mon. (Ky.) 253; *Burton v. St. George Society*, 28 Mich. 261.

19, *People v. Fire Department*, 31 Mich. 458; *People v. Medical Society*, 32 N. Y. 187.

§ 50. Same subject — General scope of the rule.—The general scope of the rule as applied to private corporations with further illustrations is thus stated by Mr. Justice Story in a leading case: "Persons acting publicly as officers of the corporation are to be presumed rightfully in office; acts done by the corporation, which presuppose the existence of other acts to make them legally operative, are presumptive proofs of the latter. Grants and proceedings beneficial to the corporation are presumed to be accepted, and slight acts on their part which can be reason-

ably accounted for only upon the supposition of such acceptance are admitted as presumptions of the fact. If officers of the corporation openly exercise a power which presupposes a delegated authority for the purpose, and other corporate acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful and the delegated authority will be presumed. If a person acts notoriously as the cashier of a bank and is recognized by the directors or the corporation as an existing officer, a regular appointment will be presumed; and his acts as cashier will bind the corporation although no written proof is or can be adduced of his appointment. In short, we think that the acts of artificial persons afford the same presumptions as the acts of natural persons. Each affords presumptions from acts done of what must have preceded them as matters of right or matters of duty." ¹

1, Bank of United States v. Dandridge, 12 Wheat. 64.

§51. Miscellaneous presumptions from the general course of business.—Among other presumptions which arise from the general course of business may be mentioned the following: That those engaged in a given trade or business are acquainted with the general customs and usages of the business where it is carried on, and with such other

facts as are necessarily incident to the proper conduct of the business.¹ Again it is presumed from the known and general custom of business that, when a bill of exchange or order or promissory note is found after circulation in the possession of the drawee or payee, the money has been paid or the obligation discharged;² also that there has been an agreement to pay for valuable services rendered and accepted.³ But there is no such presumption where the dealings are between those of the same family or those closely related by blood or marriage; in such cases an actual agreement must be proved.⁴ In the absence of any agreement as to time of payment when goods are sold, it is presumed that they are to be paid for on delivery;⁵ that acts agreed to be performed, no time being specified, are to be performed within a reasonable time,⁶ and that one who purchases goods and for a long time makes no objection to them waives objections to their quality.⁷ So where a statement of account for goods sold is rendered and no objection is made, the account is presumed correct;⁸ when regular entries of account of the sale of goods have been made by a clerk, since deceased, the presumption is that the goods were duly delivered;⁹ and a receipt for the rent due the last year or the last quarter is presumptive evidence of the payment of former rents.¹⁰ Though there is a presumption

that persons are solvent,¹¹ yet this presumption may be rebutted by proof of unsatisfied judgments against them or that a debt cannot be collected.¹² A presumption arises against the validity of a claim on which no demand for payment has been made for many years, though the insolvency of the debtor or other circumstances of explanation may rebut the presumption.¹³ In business transactions persons are presumed to have done what it was for their interest to do. It is on this theory that it has often been presumed that devises, conveyances, assignments for the benefit of creditors, charters and other acts usually beneficial to the recipient have been assented to;¹⁴ on the same principle the assent of a widow to a beneficial testamentary provision, in lieu of a dower, has been presumed.¹⁵

1, *Young v. Turing*, 2 Man. & G. 593, 603; *Hinckley v. Kersting*, 21 Ill. 247; 74 Am. Dec. 102; *McAllister v. Reib*, 4 Wend. 483; *Mills v. United States Bank*, 11 Wheat. 431; *Sutton v. Tatham*, 10 Adol & Ell. 27; *Given v. Charron*, 15 Md. 502; *Pittsburg v. O'Neil*, 1 Pa. St. 342; *Rindskoff v. Barrett*, 14 Iowa 101.

2, *Egg v. Barnet*, 3 Esp. 196; *Garlock v. Geortner*, 7 Wend 198; *Weidener v. Schweigart*, 9 Serg. & R. (Pa.) 385; *Connolly v. McKean*, 64 Pa. St. 113.

3, *In re Scott*, 1 Redf. (N. Y.) 234; *Burr v. Williams*, 23 Ark. 244.

4, *Wilcox v. Wilcox*, 48 Barb. 327; *Williams v. Hutchinson*, 3 N. Y. 312; 53 Am. Dec. 301; *Andrus v. Foster*, 17 Vt. 556; *Robinson v. Cushman*, 2 Den. 149; *Fitch v. Peckham*, 16 Vt. 150; *Weir v. Weir*, 3 B. Mon. (Ky.) 645; 39

Am. Dec. 487; *Davies v. Davies*, 9 Car. & P. 87; *King v. Kelly*, 28 Ind. 89; *Cauble v. Ryan*, 26 Ind. 207; *Gallagher v. Vaught*, 8 Hun 87; *Pellage v. Pellage*, 32 Wis. 136; *Tyler v. Burrington*, 39 Wis. 376; *Ellis v. Cary*, 74 Wis. 176.

5, *Roberts v. Wilcoxson*, 36 Ark. 355.

6, *Potter v. Deboos*, 1 Stark. 82.

7, *Davies v. Fish*, 1 G. Greene (Iowa) 406; 48 Am. Dec. 387.

8, *Webb v. Chambers*, 3 Ired. (N. C.) 374.

9, *Clark v. Magruder*, 2 Harr. & J. (Md.) 77.

10, *Brewer v. Knapp*, 1 Pick. 332; *Gilb. Ev.* (7th ed.) 142.

11, *Wallace v. Hull*, 28 Ga. 68.

12, *Beeson v. Wiley*, 28 Ala. 575; *Bilberry v. Mabley*, 20 Ala. 260.

13, *Denniston v. McKeen*, 2 McLean (U. S.) 253; *Rodman v. Hoops*, 1 Dall. (Pa.) 85; *Inches v. Leonard*, 12 Mass. 337; *Brubaker v. Taylor*, 76 Pa. St. 83; *Millege v. Gardner*, 33 Ga. 397.

14, *Towson v. Tickell*, 3 Barn. & Ald. 31; *Thompson v. Leach*, 2 Salk. 618; *Bensley v. Atwill*, 12 Cal. 231; *Lady Superior v. McNamara*, 3 Barb. Ch. (N. Y.) 375; 49 Am. Dec. 184; *Pavey v. Tilton*, 18 N. H. 151; 45 Am. Dec. 365; *Merrills v. Swift*, 18 Conn. 257; 46 Am. Dec. 315; *Newton v. Caberry*, 5 Cranch C. C. 632. But see *Maynard v. Maynard*, 10 Mass. 456; *Welch v. Sackett*, 12 Wis. 243; *Hulick v. Scovil*, 9 Ill. 159; *Governor v. Campbell*, 17 Ala. 566; *Benning v. Nelson*, 23 Ala. 801; *Cloud v. Clinkinbeard*, 8 B. Mon. (Ky.) 397; 48 Am. Dec. 397.

15, *Merrill v. Emery*, 10 Pick. 507.

CHAPTER 3.

PRESUMPTIONS — *continued.*

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- § 77. Nature of the possession required.
- § 78. Same—Changes in possession—Possession by tenant, etc.
- § 79. The presumption—How rebutted.
- § 80. Same—Disabilities—Nature of estate—What facts are relevant.
- § 81. Presumptions as to the law of sister states.
- § 82. Same subject—Limitations.
- § 83. Same subject—Foreign law.
- § 84. Contracts presumed to be legal.
- § 85. Presumptions as to marriage.
- § 86. Cohabitation and reputation to concur—Weight of presumption.
- § 87. Presumption of marriage in civil and criminal issues.
- § 88. No presumption arising from illicit cohabitation.
- § 89. Other presumptions growing out of the marriage relation.
- § 90. Same—Of coercion by the husband.
- § 91. Same subject—Nature and limits of the presumption.
- § 92. Presumptions in favor of legitimacy.
- § 93. Same—How rebutted.
- § 94. Same—Conclusive, if sexual intercourse between husband and wife is shown.
- § 95. Relevant facts when sexual intercourse between husband and wife is not shown.
- § 96. The husband or wife not allowed to deny sexual intercourse.

- § 97. Presumptions as to infants—Capacity to commit crime—Consent to sexual intercourse and marriage.
- § 98. Same subject—Testamentary capacity—Domicil—Necessaries—Torts.
- § 99. Presumptions as to identity.
- § 100. Conflicting presumptions—That of innocence prevails over other presumptions.
- § 101. Continued—Presumptions of innocence of a party overcomes the presumption of innocence of a stranger.
- § 102. Innocence—Sanity—Weight of conflicting presumptions.
- § 103. General rules as to presumptions.

§ 52. Presumptions as to continuance of the existing state of things.—When things are once proved to have existed in a particular state, they are presumed to have continued in that state until the contrary is established by evidence either direct or presumptive.¹ Although this rule has long had the sanction of the highest authority, it will be observed that it is stated in very general terms; and it must have a reasonable interpretation. It is a presumption always disputable, sometimes entitled to considerable weight, but frequently liable to be rebutted by very slight circumstances. The rule has been held to apply to the continuance of minority, a given state of health, a state of war and to other cases where obviously after a limited time the presumption could have very little weight. Perhaps the chief value

of the presumption is to determine in the cases to which it applies on whom shall rest the burden of proof. The cases cited will give illustration of the application of the rule with its limitations.

1, Best Ev. sec. 405; Tayl. Ev. sec. 196; Wilkins v. Earle, 44 N. Y. 172; 4 Am. Rep. 655; Martin v. Fishing Ins. Co., 20 Pick. 389; 32 Am. Dec. 220; Price v. Price, 16 M. & W. 232; Berrenberg v. City of Boston, 137 Mass. 231; 50 Am. Rep. 296 and long note.

§ 53. Same—As to ownership, possession, etc.—As an illustration of this rule, where a person is shown to have been the owner of property, such ownership is presumed to continue until some change or alienation is shown.¹ So that if one is shown to have been in possession or out of possession of land or personal property, the situation is supposed to continue until the contrary is shown.² So if *indebtedness* is proved it is presumed to continue until the presumption is in some way rebutted; and it is not rebutted by the mere fact that the indebtedness has since become due. The payment is an affirmative fact to be proved.³ If a judgment is shown to have been rendered, it is presumed to remain in full force in the absence of evidence to the contrary.⁴ So *solvency*, *insolvency* and *bankruptcy*, if proved, are presumed to continue, though after the lapse of time the presumption of insolvency would be entitled to little weight.⁵ The pre-

sumption is applied in the case of the *transportation of goods* which pass through the hands of several companies as common carriers. Where the goods are shown to have been in good condition at the beginning of the route and are damaged on their arrival, an action may be maintained against the last carrier as the law presumes that he received them in good condition, until the contrary is shown. Though such a rule may in some cases work hardship to the carrier, the presumption is deemed a necessity, as without it the owner of goods would often be without redress.⁶

1, Kidder v. Stevens, 60 Cal. 414; Magee v. Scott, 9 Cush. 148; 55 Am. Dec. 49. The presumption is not rebutted by the fact that another is allowed to take possession, Harriman v. Queen's Ins. Co., 49 Wis. 71; Table Mountain Mining Co. v. Waller's Mining Co., 4 Nev. 218; 97 Am. Dec. 526.

2, Sullivan v. Goldman, 19 La. An. 12; Brown v. King, 5 Met. 173; Currier v. Gale, 9 Allen 522; 3 Washb. Real Prop. p. 52.

3, Jackson v. Irvin, 2 Camp. 50; Farr v. Payne, 40 Vt. 615; O'Neill v. New York Mining Co., 3 Nev. 141; Mullen v. Pryor, 12 Mo. 307; Bell v. Young, 1 Grant Cas. (Pa.) 175; Wallace v. Hull, 28 Ga. 68. So a vendor's lien was presumed to continue, Hays v. Horine, 12 Iowa 61; 79 Am. Dec. 518.

4, Murphy v. Orr, 32 Ill. 489.

5, Walrod v. Ball, 9 Barb. 271; Donahue v. Coleman, 49 Conn 464; Body v. Jewsen, 33 Wis. 402.

6, Laughlin v. Railway Co., 28 Wis. 204; 9 Am. Rep. 493; Smith v. Railway Co., 43 Barb. 225.

§ 54. **Other illustrations of the rule.** — On the same principle it is presumed in actions of insurance that a vessel which was sea-worthy at the beginning of the voyage so continued until the loss.¹ But if a ship shortly after sailing becomes leaky or disabled without adequate cause, it is presumed to have been unsea-worthy at the commencement of the risk.² Other illustrations of the continuance of a condition or *status* are that a partnership,³ or a corporation,⁴ or an agency,⁵ once proved, still exists; that one shown to be a stockholder of a corporation remains a stockholder;⁶ that one holding a public office prior to the publication of a libel against him, was in office at the time of the publication;⁷ that a person, shown to have been unmarried, remains single,⁸ and that coverture, once shown, continues.⁹ But there can be no presumption of the prior existence of a relation or *status* from proof of its present existence. In other words a presumption is not retrospective.¹⁰ When one is shown to have been a resident or a non-resident of a given place at a given time, the burden is upon the party who claims that there has been a change.¹¹ So where a custom,¹² state of war or peace,¹³ form of government,¹⁴ public treaty¹⁵ or the common law¹⁶ has been shown to have existed or been in force at a given time, it will be presumed that the situation remains the same. And where a regu-

lar and habitual mode of doing business by a person is shown, the presumption is that a particular act was performed in the usual manner.¹⁷ It is doubtless true that sudden and marked changes sometimes take place in the character and habits of individuals, but it is equally true that such sudden changes are not in the common course of experience; they are so exceptional as not to interfere with the general presumption that the character, habits and opinions of a person continue the same.¹⁸ This rule has even been applied where two persons were shown to have sustained illicit relations with each other. Said Chancellor Walworth: "When it is once established that an adulterous intercourse has commenced between parties and they are found living together under circumstances which would induce every unprejudiced mind to conclude their inclinations had not changed, the fair presumption is that the illicit intercourse is still continued."¹⁹ The same rule was applied where one was proved at a given time to have been a gambler;²⁰ where bad character for truth and veracity had been shown,²¹ or where deliberate malice had been proved.²²

1, *Martin v. Fishing Ins. Co.*, 20 Pick. 389; 32 Am. Dec. 220.

2, *Tayl. Ev.* sec. 205; *Watson v. Clark*, 1 Dow 336; *Parker v. Potts*, 3 Dow 23.

3, *Clark v. Alexander*, 8 Scott N. R. 161; *Cox v. Wil-*

loughby, L. R. 13 Ch. Div. 863; *Cooper v. Dedrick*, 22 Barb. 516; *Anderson v. Clay*, 1 Stark. 405.

4, *People v. Manhattan Co.*, 9 Wend. 351.

5, *McKenzie v. Stevens*, 19 Ala. 691; *Ryan v. Sams*, 12 Q. B. 460.

6, *Montgomery Plank Road Co. v. Webb*, 27 Ala. 618.

7, *Rex v. Budd*, 5 Esp. 230.

8, *Page v. Findley*, 5 Tex. 391.

9, *Erskine v. Davis*, 25 Ill. 251.

10, *Erskine v. Davis*, 25 Ill. 251; *Taylor v. Cresswell*, 45 Md. 422; *Murdock v. State*, 68 Ala. 567; *Lawson Pres. Ev.* p. 190.

11, *Mitchell v. United States*, 21 Wall. 350; *Greenfield v. Camden*, 74 Me. 56; *Prather v. Palmer*, 4 Ark. 456; *Rixford v. Miller*, 49 Vt. 319; *Eaton v. Woydt*, 26 Wis. 383; *Daniels v. Hamilton*, 52 Ala. 105; *Inhabitants v. Inhabitants*, 6 Allen 508; *Kilbourn v. Bennett*, 3 Met. 199. As to condition of alienage, see *Green v. Sales*, 31 Fed. Rep. 106. The same is true as to domicil, see cases above cited. The rule does not apply in the case of a tramp, however, *Ripley v. Hebron*, 60 Me. 379.

12, *Scales v. Key*, 11 Adol. & Ell. 819.

13, *Covert v. Gray*, 34 How. Pr. (N. Y.) 450. But there is no presumption that a war will continue in the future.

14, *Gelston v. Hoyt*, 1 Johns. Ch. 543.

15, *People v. McLeod*, 1 Hill (N. Y.) 377; 37 Am. Dec. 328.

16, *Stokes v. Macken*, 62 Barb. 145.

17, *Lawson Pres. Ev.*, p. 184; *Eureka Ins. Co. v. Robinson*, 56 Pa. St. 256; 94 Am. Dec. 65; *Ashe v. De Rossett*, 8 Jones (N. C.) 240; *Shove v. Wiley*, 18 Pick. 558; *Kershaw v. Wright*, 115 Mass. 361; *Vaughn v. Raleigh Ry. Co.*, 63 N. C. 11.

18, *Smith v. Smith*, 4 Paige Ch. (N. Y.) 432; 27 Am. Dec. 75; *Cargile v. Wood*, 63 Mo. 501; *People v.*

Squires, 49 Mich. 487; Hunt's Appeal, 86 Pa. St. 294; Appeal of Reading Ins. Co., 113 Pa. St. 204.

19, See cases last cited.

20, McMahon v. Harrison, 6 N. Y. 443.

21, Sleeper v. Van Middlesworth, 4 Den. 431; Lum v. State, 11 Tex. App. 483. But see Wood v. Matthews, 73 Mo. 482.

22, State v. Johnson, 1 Ired. (N. C.) 354; 35 Am. Dec. 742.

§ 55. Presumptions as to sanity and insanity.—In the absence of any evidence on the subject, every person is presumed to be of sound mind.¹ This is but the application of the rule that the ordinary mental condition is presumed to exist. Hence it follows that, if a state of chronic or general insanity is shown, the presumption of sanity is not only removed, but there arises the presumption that insanity continues;² and the burden of proof rests upon the one, who claims that an act of such a person was during a lucid interval, to show that the lucid interval existed at the time of the act in question.³ If monomania or insanity upon particular subjects is shown, such condition is presumed to continue when the sanity of the person as to these subjects is under inquiry.⁴ If, however, the insanity is of a character likely to be merely temporary, as if it is the result of sudden or violent disease, there is no presumption of its continuance.⁵ Nor is there any presumption against the sanity of one who was formerly a lunatic

after a complete restoration to reason.⁶ But if one has been under guardianship for insanity, it is presumptive evidence of such condition.⁷

1, Sutton v. Sadler, 3 C. B. 87; Perkins v. Perkins, 39 N. H. 163; Hall v. Warren, 9 Ves. Jr. 605; Garbill v. Barr, 5 Pa. St. 441; 47 Am. Dec. 418; Achey v. Stephens, 8 Ind. 411; Staples v. Wellington, 58 Me. 453; Hix v. Whittemore, 4 Met. 545; Taylor v. Creswell, 45 Md. 422. If a person destroys his own life he is still presumed to have been sane, Jarvis v. Connecticut Mut. Life Ins. Co., 5 Ins. L. J. 507; Moore v. Connecticut Mut. Life Ins. Co., 3 Ins. L. J. 444. See also on the general subject of this section the cases cited in 11 Am. & Eng. Ency. Law 159, 160. As to presumption of sanity and innocence, see sec. 102 *infra*; as to burden of proof when insanity is in issue, see sec. 186 *infra*; as to testamentary capacity, see sec. 187 *infra*.

2, 1 Redf. Wills (3d ed.) p. 112; Rogers v. Walker, 6 Pa. St. 371; 47 Am. Dec. 470; Garbill v. Barr, 5 Pa. St. 441; 47 Am. Dec. 418; Cartwright v. Cartwright, 1 Phillim. 90; Hall v. Warren, 9 Ves. Jr. 605. See cases cited in 11 Am. & Eng. Ency. Law 160.

3, Ripley v. Babcock, 13 Wis. 425; Saxon v. Whitaker, 30 Ala. 237; Case of Cochran's Will, 1 T. B. Mon. (Ky.) 264; 15 Am. Dec. 116 and note; Harden v. Hayes, 9 Pa. St. 151; Jackson v. Van Dusen, 5 Johns. 144; 4 Am. Dec. 330. As to whether reasonableness of the act is evidence of a lucid interval, see note to McMechen v. McMechen, 17 W. Va. 683; 41 Am. Rep. 682.

4, Thornton v. Appleton, 29 Me. 298.

5, Staples v. Wellington, 58 Me. 453; Cartwright v. Cartwright, 1 Phillim. 100; Hix v. Whittemore, 4 Met. 545; Chandler v. Barrett, 21 La. An. 58; 99 Am. Dec. 701; State v. Reddick, 7 Kan. 151; Carpenter v. Carpenter, 8 Bush (Ky.) 283; People v. Francis, 38 Cal. 183.

6, Snow v. Benton, 28 Ill. 306.

7, Breed v. Pratt, 18 Pick. 115; Titlow v. Titlow, 54 Pa. St. 216; 93 Am. Dec. 691; Hart v. Deamer, 6 Wend. 497.

§ 56. Presumption of continuance of life.—When a person is shown to have been living at a given time the continuance of life will be presumed, until the contrary is proved or is to be inferred from the nature and circumstances of the case;¹ this is true, even though it appears that the person in question at the time stated was in *poor health*.² In numerous instances the courts have refused, in the absence of proof, to assume the death of persons proved to have been alive at some former time even after a long interval had passed, holding that in such cases the burden of proof rests with those who assert the death.³ Thus where a witness gave his deposition in 1682, the court held in 1732 that, in the absence of any proof to the contrary, the continuance of life would be presumed; and the court rejected the deposition.⁴ It has been said that the civil law presumed a person still living at a hundred years of age and that the common law does not stop much short of this.⁵ Indeed, it was solemnly asserted by the court of Queen's Bench that it could not judicially presume that a person alive in 1034 was not still living in 1824.⁶ Of course the presumption of the continuance of life would not now be carried to any such absurd limit. By the decisions under the common law there is *no specific length of time* at the end of which the presumption of the continuance of life is held to cease. As

we have seen the courts will not presume that death has taken place, although on the contrary presumption the person must have reached an extreme old age. But the courts ought not to assume that which in view of the usual duration of human life is practically impossible.⁷

1, *In re Hall*, 1 Wall. Jr. (U. S.) 85; *Peabody v. Hewett*, 52 Me. 33; 83 Am. Dec. 486; *Wilson v. Hodges*, 2 East 313. See articles on this subject in 14 Cent. Law Jour. 286, 302, 322, 345, 367; 15 Cent. Law Jour. 246; also article by Gustavus Schmidt, 2 So. Law Rev. N. S. 594; and articles in 25 Jour. Juris. 295; 12 So. Law Jour. & Rep. 23; 48 Law Times 228, 430.

2, *In re Hall*, 1 Wall. Jr. (U. S.) 85, in this case the person, if living, would have been eighty years of age.

3, *In re Tindall's Trustee*, 30 Beav. 151; *Hammond v. Inloes*, 4 Md. 138, a grantee of a patent of land was presumed to be living seventy-eight years after the date of the patent. See also *Watson v. Tindall*, 24 Ga. 494; 71 Am. Dec. 142, where it appeared that the party whose death was in question in 1857 was a revolutionary soldier.

4, *Benson v. Olive*, 2 Str. 920.

5, *Watson v. Tindall*, 24 Ga. 494; 71 Am. Dec. 142.

6, *Atkins v. Warrington*, 1 Chitty PL (6th ed.) 258.

7, *Tayl. Ev. sec. 198*; *Whart. Ev. sec. 1274*.

§ 57. Presumptions of death after seven years absence.—As the courts had to resort to the presumption of the continuance of life, in the absence of direct proof of life or death, in order to settle important rights which were often involved, it became equally necessary to adopt some counter pre-

sumption in classes of cases where the death of the person would in the ordinary course of events seem more probable than the continuance of life.¹ Accordingly in analogy to certain English statutes the courts adopted the rule that "a person, shown not to have been heard of for seven years by those (if any) who, if he had been alive, would naturally have heard of him, is presumed to be dead, unless the circumstances of the case are such as to account for his not being heard of without assuming his death."² In this country the rule has generally been applied only to those who were *absentees from their home*; and is thus stated in a Massachusetts case: "If a man leaves his home and goes into parts unknown and remains unheard from for the space of seven years, the law authorizes, to those that remain, the presumption of fact that he is dead; but it does not authorize him to presume therefore that any one of those remaining in the place which he left has died."³ It is not necessary, in order to raise this presumption, that the removal should be *beyond the seas* or even to a *distant state*; but if one removes from his state to a fixed place of residence in another state, the fact that he has remained unheard of in the former state does not alone authorize the presumption.⁴ It need hardly be added that this is *not a conclusive presumption*. It is one of fact and is subject to be controlled by the

facts of the case. It is one which varies in weight according to the circumstances.⁶ The presumption under discussion is an arbitrary one rendered necessary on grounds of public policy in order that rights depending on the life or death of persons long absent and unheard of might be settled by some certain rule.⁷ It is not enough to raise the presumption that the person has not been heard from for seven years. It is not only necessary to show this, but also to show his absence from home and *that inquiry has been made* at the place of residence of such person abroad, if he had any known fixed residence,⁸ even though such residence is beyond the sea.⁹ But it is not necessary that inquiry should be made in those places which he has merely visited or to which he may have gone temporarily.¹⁰ In determining whether the absentee has been heard from within seven years the testimony of any person having knowledge of the fact may be received. There is no rule of law which confines such intelligence *to members of the family* or to any other particular class of persons. It is not a question of pedigree.¹¹ It follows of course that, if it is proved that the person has been seen or heard from within the seven years, the presumption does not obtain.¹²

1, For a discussion of this general subject see the cases cited in this section and also the articles and annotated cases cited in the last section.

2, Steph. Ev. art. 99; 1 Greenl. Ev. sec. 41; George v. Jesson, 6 East. 80; In re Phrene's Trust, L. R. 5 Ch. App. 139; Nepean v. Knight, 2 M. & W. 894; McMahon v. McElroy, Ir. Rep. 5 Eq. 1; Hopewell v. De Pinna, 2 Camp. 113; Nepean v. Doe, 2 M. & W. 910; 2 Smith L. C. 584; Rex v. Harborne, 2 Adol. & Ell. 540; Hyde Park v. Inhabitants of Canton, 130 Mass. 500; Davie v. Briggs, 97 U. S. 628; Baden v. McKenney, 7 Mackey (D. C.) 268; Bank v. Trustees, 83 Ky. 219.

3, Hyde Park v. Canton, 130 Mass. 505; Stevens v. McNamara, 36 Me. 176; Stinchfield v. Emerson, 52 Me. 465; 83 Am. Dec. 524; Winship v. Conner, 42 N. H. 341; Com. v. Thompson, 6 Allen 591.

4, Winship v. Conner, 42 N. H. 341. But see Spurr v. Trimble, 1 Marsh. A. K. (Ky.) 279.

5, McCartee v. Camel, 1 Barb. Ch. (N. Y.) 455.

6, In re Phrene's Trust, R. L. 5 Ch. App. 139; Davie v. Briggs, 97 U. S. 628; Hyde Park v. Canton, 130 Mass. 505. And see Faulkner's Administrator v. Williman (Ky.), 16 S. W. Rep. 362.

7, Whiting v. Nicholl, 46 Ill. 230; 92 Am. Dec. 248.

8, McCartee v. Camel, 1 Barb. Ch. 455; Stinchfield v. Emerson, 52 Me. 465; 83 Am. Dec. 524; Thomas v. Thomas, 16 Neb. 553; Brown v. Jewett, 18 N. H. 230; Gray v. McDowell, 6 Bush 455; In re Creed, 1 Drewry 235. But see, Osborn v. Allen, 26 N. J. L. 388; Smith v. Smith, 5 N. J. Eq. 484; Wambaugh v. Schenck, 2 N. J. L. 167; Smith v. Smith, 49 Ala. 156; Stevens v. McNamara, 36 Me. 176; 58 Am. Dec. 740; Ferry v. Sampson, 112 N. Y. 415.

9, McCartee v. Camel, 1 Barb. Ch. (N. Y.) 455.

10, Winship v. Conner, 42 N. H. 341.

11, Flynn v. Coffee, 12 Allen 133; Doe v. Deakin, 4 Barn. & Ald. 433; Smith v. Combs, 49 N. J. Eq. 420.

12, Smith v. Allen, 49 Ala. 156; O'Kelly v. Felker, 71 Ga. 775; Dowd v. Watson, 105 N. C. 476; 18 Am. St. Rep. 920. See cases cited above.

§ 58. No presumption that death occurred at a particular time.—In some of the cases the view is maintained that, if no sufficient facts are shown from which to draw a reasonable inference that death occurred before the lapse of seven years, the person will be deemed in all legal proceedings to have lived during that period and to have died at its expiration; that the presumption of death which arises at the end of the seven years cannot act retrospectively, and that to this extent the time as well as the fact of the death are to be presumed.¹ But by the weight of authority the presumption is only that the person is dead at the expiration of seven years, not that the death occurred at the end of that time or at any other particular time within that period. This is left to be determined as a matter of fact, according to the circumstances which may tend to satisfy the mind that it was at an earlier or later day.²

1, *Clarke v. Canfield*, 15 N. J. Eq. 119; *Burr v. Sim*, 4 Whart. (Pa.) 150; 33 Am. Dec. 50; *Whiting v. Nicholl*, 43 Ill. 235; 92 Am. Dec. 248; *Montgomery v. Bevans*, 1 Sawy. (U. S.) 653; *Smith v. Knowlton*, 11 N. H. 191.

2, *Nepean v. Knight*, 2 M. & W. 894; *In re Phene's Trust*, L. R. 5 Ch. App. 139; *Davie v. Briggs*, 97 U. S. 628; *Spencer v. Moore*, 11 Ired. (N. C.) 160; 13 Ired. (N. C.) 333; *McCartee v. Camel*, 1 Barb. Ch. (N. Y.) 455.

§ 59. When death may be inferred from an absence of less than seven years.—We have seen that the presumption

is not rigid or conclusive; that the seven years may be abridged and the presumption applied earlier by proof of special circumstances tending to show that the death occurred at an earlier period.¹ For example, in case the person in question embarked on a vessel which was not heard of and which was long overdue, inquiries having been made at ports of departure and of destination;² and where within the time the absentee was known to be in a desperate *state of health*,³ or where he was of grossly intemperate habits when last heard of.⁴ So also where at some time during the period he has encountered a "*specific peril*,"⁵ which means not the ordinary dangers of travel or of navigation, but some unusual and extraordinary danger.⁶ The same rule applies where his habits, character, domestic relations⁷ or necessities⁸ would have made it certain that, if alive within that period, he would have returned to or *communicated* with persons at his place of residence or domicil.⁹ The same inference arises upon the production of *letters testamentary* issued upon his estate.¹⁰ But where it is improbable that the absentee, even if alive, would or could have been heard of or would or could have communicated with his home, the presumption of death will not attach even at the end of the seven years;¹¹ nor will it attach where in other judicial proceedings the absentee is recorded as hav-

ing been alive after the lapse of the period of seven years.¹²

1, *Whiteley v. Equitable Life Assurance Society*, 72 Wis. 170, 176; *Waite v. Coaracy*, 45 Minn. 159.

2, *White v. Mann*, 26 Me. 363; *Watson v. King*, 1 Stark. 121; *In re Hutton*, 1 Curt. 595; *In re Cooke, Jr.* Rep. 5 Eq. 240; *Gerry v. Post*, 13 How. Pr. (N. Y.) 118; *In re Bishop*, 1 Swab. & T. 303; *Eagle's Case*, 3 Abb. Pr. (N. Y.) 318.

3, *Danby v. Danby*, 5 Jur. N. S. 54; *Webster v. Birchmore*, 13 Ves. 362. But the phrase "bad health" is not specific enough to support the presumption, *In re Hall*, 1 Wall. Jr. (U. S.) 85.

4, *Stonvenel v. Stephens*, 2 Daly (N. Y.) 319; *Chambreleng v. Purton*, 125 N. Y. 610.

5, *Burr v. Sim*, 4 Whart. (Pa.) 150; 33 Am. Dec. 50.

6, *Gibbs v. Vincent*, 11 Rich. (S. C.) 323; *Learned v. Corley*, 43 Miss. 687; *In re Norris*, 1 Swab. & T. 6; *Watson v. King*, 1 Stark. 121.

7, *Tisdale v. Connecticut Mut. Ins. Co.*, 26 Iowa 170; 96 Am. Dec. 136.

8, *In re Beasley*, L. R. 7 Eq. 498; *Hickman v. Upsall*, L. R. 20 Eq. 139.

9, *Marden v. City of Boston*, 155 Mass. 359.

10, *Newman v. Jenkins*, 10 Pick. 515; *French v. Frazier*, 7 Marsh. J. J. (Ky.) 425.

11, *McMahon v. McElroy, Jr.* Rep. 5 Eq. 1; *Watson v. England*, 14 Sim. 28; *Lakin v. Lakin*, 34 Beav. 443; *In re Milehanis Trust*, 15 Beav. 507; *Dowley v. Winfield*, 14 Sim. 277.

12, *Keech v. Rinehart*, 10 Pa. St. 240.

§ 60. Presumption of survivorship in common disaster.—The civil law recognized certain arbitrary rules or presumptions

for determining the relative times of death of two or more persons who perished in the same catastrophe. Among the civilians these questions have given rise to infinite discussion and refinement; it suffices without enumerating particular rules to state that by the civil law in such cases persons who by reason of age or sex or state of health were deemed best able to struggle for life were presumed to have been the survivors.¹ This rule, however, has never prevailed in the common law and our courts have rejected this conjectural mode of arriving at a fact which, from its nature, must often remain uncertain and upon the truth of which the title to large amounts of property often depends. The rule supported by the weight of authority in England and in this country is that, when the death of two or more persons results from a common disaster, the case must be determined *upon its own peculiar facts and circumstances*, whenever the evidence is sufficient to support a finding of such survivorship, but in the absence of any such evidence the question of such survivorship is regarded as unascertainable and in such cases the question is determined as if the death of all occurred at the same moment.² This assumption is accepted, not because the fact is proved nor because there is any presumption to that effect, but because there is no evidence and no presumption to the contrary, and further because the person asserting survivorship in

such case, having the burden of proof and being unable to support his claim by evidence, necessarily fails.³ In other words the fact of *survivorship* like every other fact *must be proved by the party asserting it.*⁴ Hence if there are any facts which throw light upon the question of survivorship and which tend to show that one person did survive others, the question becomes one of fact for the court or jury to determine under the general rules of evidence.⁵ And where there is evidence from which fair inferences may be drawn in such cases, the courts are justified in considering all the circumstances of the disaster, however minute, and all the facts which throw light upon the situation of the parties and the probabilities of the case.⁶ And where the question becomes one for the jury by reason of the fact that one of the persons was seen in a place of greater safety than the others or known to be living after the others were supposed to be lost, the *jury may consider all the circumstances* of the case including the differences in age, sex or health.⁷

1, 1 Greenl. Ev. sec. 29.

2, Newell v. Nichols, 75 N. Y. 78; 31 Am. Rep. 424. Death caused by fire, Will of Abram Ehle, 73 Wis. 445; by shipwreck, Johnson v. Merithew, 80 Me. 111; 6 Am. St. Rep. 162; Wing v. Angrave, 8 H. L. Cas. 183; Russell v. Hallett, 23 Kan. 276; Coye v. Leach, 8 Met. 371; 41 Am. Dec. 523; where two persons were swept by the same wave into the sea, Underwood v. Wing, 4 De Gex, M. & G. 657; where a mother and her infant lost their lives in the

same shipwreck, *Stinde v. Goodrich*, 3 Redf. (N. Y.) 87; where the whole family perished in the flood, *Cowman v. Rogers*, 73 Md. 403.

3, See cases last cited.

4, See cases cited above.

5, *In re Phene's Trust*, L. R. 5 Ch. App. 139; *Underwood v. Wing*, 19 Beav. 459; *Will of Abram Ehle*, 73 Wis. 445; *Newell v. Nichols*, 75 N. Y. 78; 31 Am. Rep. 424; *Cooke v. Caswell*, 81 Tex. 678.

6, *Will of Abram Ehle*, 73 Wis. 445, in this case several persons were burned in the same house in the night and the court considered testimony in detail in arriving at a conclusion. See also *Smith v. Croom*, 7 Fla. 81.

7, *Pell v. Ball*, 1 Cheves Eq. (S. C.) 99, a case of shipwreck; *Underwood v. Wing*, 19 Beav. 459, where one of the survivors was last seen floating on a spar; *Broughton v. Randall*, Cro. Eliz. 503, where two persons were executed at the same time.

§ 61. Presumption of payment from lapse of time.—By the common law there was no stated or fixed time for the bringing of actions. The law was always open; satisfaction was never presumed.¹ As statutes of limitation were from time to time enacted, judges both in the courts of law and chancery by a kind of judicial legislation gradually extended the principles involved in such statutes by analogy to cases which, though not within the letter, were yet within the spirit of the law.² Although the courts recognized the principle that when a debt is shown to exist it should be presumed to continue until payment is shown, yet they held that the

payment of a debt may be inferred or presumed from a failure to make demand for a long period of time, and from other circumstances apparently inconsistent with the continuance of the debt.³ The rule that payments of debts may be presumed from the lapse of time is one of convenience and policy, the result of a necessary regard to the peace and security of society. "Justice cannot be satisfactorily done when parties and witnesses are dead, vouchers lost or thrown away and a new generation has appeared on the stage of life, unacquainted with the affairs of a past age and often regardless of them. Papers which our predecessors have carefully preserved are often thrown aside or scattered as useless by their successors. It has been truly said that if families were compelled to preserve them they would accumulate to a burthensome extent. Hence, statutes of limitation have been enacted in all civilized communities, and in cases not within them, prescription or presumption is called in as an auxiliary to the administration of justice. Courts of equity consider it mischievous to encourage claims founded on transactions that took place at a remote period. They therefore grant no relief after a great length of time. In a word, the most solemn muniments are presumed to exist in order to support long possession; the most solemn of human obligations lose their binding efficacy

and are presumed to be discharged after a lapse of many years." ⁴ These and other considerations have led to a long line of decisions establishing the rule that, independently of any statute of limitations, a debt, which has been due and unclaimed and without recognition or the payment of interest for twenty years after becoming due, has been paid. ⁵

1, *Buchannan v. Rowland*, 5 N. J. L. 721. For a discussion of the general subject, see note to *Alston v. Hawkins*, 18 Am. St. Rep. 879-888.

2, *Buchannan v. Rowland*, 5 N. J. L. 721.

3, See cases cited hereafter.

4, *Foulk v. Brown*, 2 Watts (Pa.) 216; *Bean v. Tonnele*, 94 N. Y. 381; 46 Am. Rep. 153.

5, *Brock v. Savage*, 31 Pa. St. 410; *Lyon v. Adde*, 63 Barb. 89; *Jarvis v. Albro*, 67 Me. 310; *Olden v. Hubbard*, 34 N. J. Eq. 85; *Peters' Appeal*, 106 Pa. St. 340; *Cowie v. Fisher*, 45 Mich. 629; *Manning v. Meredeth*, 69 Iowa 430; *Willingham v. Chick*, 14 S. C. 93; *Lynde v. Dennison*, 3 Conn. 391; *Pattie v. Wilson*, 25 Kan. 326; *Ludlow v. Van Camp*, 6 N. J. L. 113; 11 Am. Dec. 529; *Clark v. Clemen*, 33 N. H. 563; *Goodwyn v. Baldwin*, 59 Ala. 127; *Ray v. Pearce*, 84 N. C. 485; *Bellas v. Levan*, 4 Watts (Pa.) 294; *McCormick v. Evans*, 33 Ill. 327; *Lyon v. Odell*, 65 N. Y. 28; *Newcomb v. St. Peter's Church*; 2 Sandf. (N. Y.) 636; *Hayes v. Whitall*, 13 N. J. Eq. 241.

§ 62. **Illustrations of the rule.**— While it is impracticable to enumerate all the claims, rights or demands which will be presumed to be paid or satisfied after the lapse of twenty years, the following instances may be cited as illustrating the rule: After twenty years, judgments,¹ bonds,² mortgages,³ notes or other

evidences of debt not under seal,⁴ taxes,⁵ merchants accounts,⁶ accounts due upon covenant,⁷ money due on contract for purchase of land,⁸ recognizances in orphans court⁹ and rents reserved in a perpetual lease or conveyance in fee¹⁰ are presumed to be paid. When lands are conveyed to a trustee for the payment of certain creditors with directions to pay the balance to designated persons, after long lapse of time the debts will be presumed paid and the trust executed.¹¹ But in a proceeding to enforce payment of a legacy as a lien upon land devised subject to payment, where there has been no denial or repudiation of the trust, the lapse of time raises no presumption of payment. A trustee cannot be presumed to hold adversely to his *cestui que trust*; on the contrary he is presumed to hold for his *cestui que trust* until the contrary appears.¹² On the same general principle it may be presumed that an estate has been duly distributed;¹³ that an administrator was qualified,¹⁴ or that he has made a settlement.¹⁵ The presumption is also applicable to the case of a covenant for the delivery of property or the performance of other like duties.¹⁶ In the case of a debt payable by installments and secured by a penal bond, the presumption arising from lapse of time applies to each installment as it falls due.¹⁷

1, Bird's Admin. v. Inslee's Ex., 23 N. J. Eq. 363; Kinsler v. Holmes, 2 S. C. 483; Miller v. Smith's Ex., 16

Wend. 425; *Chapman v. Loomis*, 36 Conn. 459, mere lapse of time, less than twenty years from the rendition of a judgment, does not raise a presumption of payment. For cases on this general subject see extended note, 18 Am. St. Rep. 880-881.

2, *Smith v. Benton*, 15 Mo. 371; *Durham v. Greenly*, 2 Harr. (Del.) 124; *Tinsley v. Anderson*, 3 Call (Va.) 329; *Shubrick v. Adams*, 20 S. C. 49; *Delaney v. Robinson*, 2 Whart. 503; *Noevell v. Little*, 79 Va. 141; *Hale v. Pack's Ex.*, 10 W. Va. 145.

3, *Agnew v. Renwick*, 27 S. C. 562; *Bowie v. Poor School Society*, 75 Va. 300; *Pryor v. Wood*, 31 Pa. St. 142; *Inches v. Leonard*, 12 Mass. 379; *Jackson v. Wood*, 12 Johns. 242; *Sweetser v. Lowell*, 33 Me. 446; *Barned v. Barned*, 21 N. J. Eq. 245; *Smith v. Niagara Fire Ins. Co.*, 60 Vt. 682; 6 Am. St. Rep. 144; *Delaney v. Brunette*, 62 Wis. 615.

4, *Bean v. Tonnale*, 94 N. Y. 381; 46 Am. Rep. 153; *Lash v. Von Neida*, 109 Pa. St. 207; *Clark v. Clement*, 33 N. H. 563; *Dixon v. Gourdin*, 26 S. C. 391. See note, 18 Am. St. Rep. 882.

5, *Hopkinton v. Springfield*, 12 N. H. 328; *Fisher v. Mayor of New York*, 6 Hun (N. Y.) 54; *Dalton v. Bethlehem*, 20 N. H. 505; *Colebrook v. Stewartstown*, 28 N. H. 75; *Andover v. Merrimack County*, 37 N. H. 437; *Elliot v. Williamson*, 11 Lea (Tenn.) 38.

6, *Kingsland v. Roberts*, 2 Paige Ch. (N. Y.) 193. See also *Fuhrman v. Loudon*, 13 Serg. & R. (Pa.) 386; 15 Am. Dec. 608.

7, *Stockton's Admin. v. Johnson*, 6 B. Mon. (Ky.) 409.

8, *Morrison v. Funk*, 23 Pa. St. 421; *McCormick v. Evans*, 33 Ill. 327.

9, *Ankeny v. Penrose*, 18 Pa. St. 190.

10, *Lyon v. Odell*, 65 N. Y. 28, but the non-payment for more than that period does not raise the presumption that the covenant of payment has been released or discharged.

11, *Drysdale's Appeal*, 14 Pa. St. 531; *Webb v. Dean*, 21

Pa. St. 29; Prevost v. Gratz, 6 Wheat. 481; Coleman v. Lane, 26 Ga. 515.

12, Williams v. Williams, 82 Wis. 393; 2 Perry Trusts sec. 866.

13, Hooper v. Howell, 52 Ga. 315.

14, Battles v. Holley, 6 Me. 145.

15, Austin v. Jordan, 35 Ala. 642; Gregg v. Bethea, 6 Port. (Ala.) 9; O'Brien v. Holland, 3 Blackf (Ind.) 490.

16, Philips v. Morrison, 3 Bibb (Ky.) 105; 6 Am. Dec. 638.

17, State v. Loff, 3 Harr. (Del.) 421.

§ 63. **Lapse of time not a bar, but evidence to raise the presumption.**—Said Lord Mansfield: "There is a great difference between length of time which operates as a bar to a claim and that which is only used by way of evidence." He gives the statute of limitations as an instance of the former; and as an example of the latter mentions the presumption of the discharge of a debt founded upon lapse of time.¹ The statute may be *pleaded in bar* and is conclusive, though the debt is not paid; but the lapse of time *only raises a presumption* which may be repelled by other circumstances to be considered in arriving at the truth.² When twenty years have elapsed since a debt became due, the jury ought to presume that it has been paid. In fact, the lapse of this period of time is sufficient *prima facie* evidence of payment, and it must be accepted by the court and jury unless there is other

evidence to explain the delay and rebut the presumption.³ Thus it will be seen that length of time is no positive bar, but that it is proper evidence to be left to the jury to aid in deciding on the presumption.⁴ This presumption of payment in reference to debts not embraced in the statute of limitations, although just as important, is not a presumption of law,—one which the court itself may apply,—but one of fact, which shifts the burden of proof. The presumption *prima facie* obliterates the debt and shifts the burden of proof to the creditor, not to establish a new contract as in a case where a debt is barred by the statute of limitations, but to show that payment of the debt has not been made.⁵ Although the court cannot make such a presumption, a new trial will usually be granted if a jury disregard it.⁶

1, Mayor of Kingston on Hull v. Homer, Cowp. 102; Livingston v. Livingston, 4 Johns. Ch. (N. Y.) 287; 8 Am. Dec. 562; Wanmaker v. Van Buskirk, 1 Saxt. Ch. (N. J.) 685; 23 Am. Dec. 748.

2, Allen v. Everly, 24 Ohio St. 97; Brobst v. Brock, 10 Wall. 519; Bailey v. Jackson, 16 Johns. 210; 8 Am. Dec. 309; Alston v. Hawkins, 105 N. C. 3; 18 Am. St. Rep. 874; Shields v. Pringle, 2 Bibb (Ky.) 387; Howland v. Shurtleff, 2 Met. 26; 35 Am. Dec. 384; Bell's Appeal, 122 Pa. St. 486; Gulick v. Loder, 1 Green (N. J.) 68; 23 Am. Dec. 711; Jackson v. Pierce, 10 Johns. 414.

3, King's Ex. v. Coulter's Ex., 2 Grant Cas. (Pa.) 77; Cope v. Humphreys, 14 Serg. & R. (Pa.) 21; Brock v. Savage, 31 Pa. St. 410; Bellas v. Levan, 4 Watts (Pa.) 294; Tilghman v. Fisher, 9 Watts (Pa.) 442.

4, Lesley v. Nones, 7 Serg. & R. 410; Boardman v. De

Forest, 5 Conn. 1; Pickering v. Stamford, 2 Ves. Jr. 452; Jackson v. Sackett, 7 Wend. 94; Stover & Barnes v. Duren, 3 Strob. (S. C.) 448; 51 Am. Dec. 634.

5, Stover & Barnes v. Duren, 3 Strob. (S. C.) 448; 51 Am. Dec. 634; Yarnell v. Moore, 3 Cold. (Tenn.) 173; Queen v. Fletcher, 4 Rich. Eq. (S. C.) 152.

6, Stover & Barnes v. Duren, 3 Strob. (S. C.) 448; 51 Am. Dec. 634.

§ 64. Mere lapse of time less than twenty years, not enough.—From lapse of time alone, this presumption can never arise, unless the full period of twenty years has expired.¹ If a shorter period, even a single day less than twenty years, has elapsed, the presumption of satisfaction does not arise.² A lapse of time less than twenty years, in cases to which the statute does not apply, is only a circumstance which may with others afford proof of payment, but is of itself insufficient for that purpose.³ And when by the expiration of the full period the presumption of payment has acquired an artificial force, so that it stands in place of belief, *even an admission* that the payment has not been made cannot of itself destroy the effect which considerations of policy have given to a certain period of time.⁴ The presumption raised from a definite time, no more permits a jury to give to a shorter time a force beyond its natural efficacy in producing belief, than the bar under the statute of limitations permits a near approach to the statutory

period to avail; and a verdict found in contravention of this principle will be set aside.⁶ In estimating whether the twenty years have elapsed without payment *the time, in which for any reason the creditor has no legal right to bring suit on the note*, must be excluded.⁶ The law gives to the lapse of time an artificial and technical weight beyond that which it would naturally have as a mere circumstance bearing on the question of payment.⁷

1, In regard to a mortgage, it was held in *Boon v. Pierpont*, 28 N. J. Eq. 7, that no presumption arose from the lapse of nineteen years, or of a less time, particularly where for a part of the time the business of the courts is interfered with by war. As to the general subject see notes, 88 Am. Dec. 590; 18 Am. St. Rep. 879-888; also 18 Am. & Eng. Ency. Law 211.

2, *Calwell v. Prindle*, 11 W. Va. 307; *Sadler's Administrator v. Kennedy's Administrator*, 11 W. Va. 187; *Thomas v. Hunnicutt*, 54 Ga. 337; *Lesley v. Lesley*, 7 Serg. & R. (Pa.) 410.

3, As seventeen years in case of promissory notes, *Smithpeter v. Ison's Adm.* 4 Rich. L. (S. C.) 203; 53 Am. Dec. 732; or of a bond, *Calwell v. Prindle*, 11 W. Va. 307; or nineteen years in case of a mortgage, *Boon v. Pierpont*, 28 N. J. Eq. 7; or in case of a judgment, *Daby v. Ericsson*, 45 N. Y. 786. See also *Delaney v. Brunette*, 62 Wis. 615.

4, In considering admissions which rebut this presumption, the same principles are applicable as in considering admissions to take a cause of action out of the statute of limitations, *Stover & Barnes v. Duren*, 3 Strob. (S. C.) 448; 51 Am. Dec. 634. But it was held in *Levers v. Van Buskirk*, 7 Watts & Serg. (Pa.) 70, that it does not require so strong evidence to rebut the presumption of payment, arising after a lapse of twenty years, as it does to take a case out of the statute of limitations.

5, *Smithpeter v. Ison's Adm.*, 4 Rich. L. (S. C.) 203; 53 Am. Dec. 732.

6, *Criss v. Criss*, 28 W. Va. 388; *Mason v. Spurlock*, 4 Baxt. (Tenn.) 554; *Boyce v. Lake*, 17 S. C. 481; 43 Am. Rep. 618; *Penrose v. King*, 1 Yeates (Pa.) 344.

7, *Walker v. Wright*, 2 Jones (N. C.) 155.

§ 65. A less period than twenty years with other circumstances may suffice.—

A shorter time than twenty years may, in connection with other circumstances, raise a presumption of fact that payment has been made.¹ The law does not and cannot define exactly what these circumstances shall be; the decision of the question must necessarily depend upon the facts of each case.² Among the circumstances which may be given in evidence to aid lapse of time in establishing a presumption of payment are the character of the plaintiff for strictness in the collection of debts that are due him;³ the *needy circumstances* of the creditor, and the easy and *solvent condition* of the debtor.⁴ Thus where a bill was filed to enforce a vendor's lien against a sub-purchaser twelve years after the maturity of the debt, and the complainant admitted that she well knew of the existence of the lien, but had taken no steps to enforce it, though she needed the money for the common necessities of life; that she had known of the insolvency of the purchaser soon after the date of the contract, and that she had interposed no objection to a public sale of the premises by him, these circumstances, together with the lapse of time, were held to

raise a strong presumption of payment.⁵ Among other facts which have been held relevant to this issue are that the creditor and debtor had *running accounts* on which large payments were made, and that they lived near each other,⁶ as well as the fact that no demand of payment or attempt to enforce the claim has been made.⁷ When the time has nearly elapsed, very slight circumstances may be received as relevant and left to the jury. Still they must be such circumstances as aid the presumption arising from lapse of time; they must tend to show that the time would not have been suffered to elapse had the debt remained unpaid.⁸ The presumption *strengthens as the time approaches to twenty years*, and the circumstances needed to establish it may be measured by the diminished scale. The further the time stops short of twenty years the more cogent and decisive must be the circumstances relied upon. "If evidence be offered which in the judgment of the court will, in connection with the lapse of time, reasonably tend to convince the jury that the debt has been paid short of twenty years or that it has not been paid, notwithstanding that period, it is the duty of the court to receive it and to submit it to the jury with such instruction as shall enable them to estimate it at what it is really worth."⁹

1, Brubaker's Adm. v. Taylor, 76 Pa. St. 83; Henderson v. Lewis, 9 Serg. & R. (Pa.) 379; 11 Am. Dec. 733; Den-

niston v. McKeen, 2 McLean (U. S.) 253; Hughes v. Hughes, 54 Pa. St. 240; Leiper v. Erwin, 5 Yerg. (Tenn.) 97; Brigg's Appeal, 93 Pa. St. 485; Calwell's Ex. v. Prindle's Adm., 19 W. Va. 604; Colsell v. Budd, 1 Camp. 27; Freem. Judg. sec. 465; 2 Greenl. Ev. sec. 528.

2, Diamond v. Tobias, 12 Pa. St. 312.

3, Lieper v. Erwin, 5 Yerg. (Tenn.) 97.

4, Hughes v. Hughes, 54 Pa. St. 240; Levers v. Van Buskirk, 4 Pa. St. 309; Morrison v. Collins, 127 Pa. St. 28; 14 Am. St. Rep. 827; Bean v. Tonnele, 94 N. Y. 381; 46 Am. Rep. 153 such evidence received to fortify the presumption after the lapse of twenty years. But see Daby v. Ericsson, 45 N. Y. 786.

5, May v. Wilkinson, 76 Ala. 543. But the pecuniary situation of the parties is not enough, Alexander v. Dutcher, 7 Hun 439.

6, King's Ex. v. Coulter's Ex., 2 Grant Cas. (Pa.) 77; Milledge v. Gardner, 33 Ga. 397.

7, McDaniel v. Goodall, 2 Cold. (Tenn.) 391; Jacobs v. State, 127 Ind. 77, attorney services, no demand made for fourteen years; Long v. Straus, 124 Ind. 84, delay of nearly twenty years in presenting a claim, with other facts; Semple v. Glenn, 91 Ala. 245; 24 Am. St. Rep. 894, action on stock subscription.

8, Blackburn v. Squib, Peck (Tenn.) 60; Hughes v. Hughes, 54 Pa. St. 240; Wood v. Egan, 39 La. An. 684.

9, King v. Coulter, 2 Grant Cas. (Pa.) 77. On the general subject of this section see extended note to Alston v. Hawkins, 18 Am. St. Rep. 879 *et seq.*

§ 66. The presumption — How rebutted. — The presumption of payment arising from the lapse of time may of course be rebutted by satisfactory and convincing proof; but in such case the burden of proof rests upon the creditor.¹ The following are some of the

facts which have been received for the purpose of rebutting this presumption: part payment at any time within the period required to raise the presumption of payment,² notorious insolvency of the debtor during the whole time or nearly the whole time since the indebtedness became due,³ the issuing and return of an execution *nulla bona*,⁴ the absence of the debtor from the state during the greater part of the period relied upon to create the presumption,⁵ the acknowledgment of the debt by the debtor during such period,⁶ the recognition of an existing debt and the promise to pay,⁷ demands for payment proved to have been made on the debtor by the creditor,⁸ the existence of war or other facts preventing the creditor from bringing suit,⁹ agreements extending the time of payment,¹⁰ the insanity of the debtor,¹¹ the fact of the relationship of the parties and that the collection of money might have occasioned distress or great inconvenience.¹² From the illustrations which have been given, it sufficiently appears that there is a great variety of facts which may be relevant to rebut the presumption of payment from lapse of time; and it has been broadly declared that *any facts and circumstances, which render it more probable than otherwise that payment has not in fact been made, may be received.* These facts should be such as will satisfy the minds of the jury on that subject.¹³ While the

same precision of proof which is necessary to remove the bar of the statute of limitations is not required, yet the presumption of payment after twenty years is a strong one, binding alike upon court and jury until invalidated by proof. Hence the evidence to rebut the presumption should be *satisfactory and convincing*.¹⁴ It does not suffice merely to show that a former suit has been commenced and abandoned,¹⁵ or the poverty of the debtor,¹⁶ or an indorsement of payment by the creditor without the privity of the debtor,¹⁷ or to show, as against the executor, part payment on a bond by one of the heirs.¹⁸ Although, as we have seen, the presumption may be rebutted by admissions of non-payment, yet admissions of this character will not be so readily implied from language casually addressed to a stranger as when addressed to the creditor in reply to a demand for the debt.¹⁹

1, Gregory v. Com, 121 Pa. St. 611; 6 Am. St. Rep. 804; Barker v. Jones, 62 N. H. 497; 13 Am. St. Rep. 586. On this general subject see note to Ashton v. Hawkins, 18 Am. St. Rep. 887-888.

2, Dickson v. Gourdin, 26 S. C. 391; 29 S. C. 343; Belo v. Spach, 85 N. C. 122; Hamlin v. Hamlin, 3 Jones Eq. (N. C.) 191.

3, McClellan v. Crofton, 6 Me. 334; Fladong v. Winter, 19 Ves. 197; Kilpatrick v. Page, 2 Brock. (U. S.) 20; Farmer's Bank v. Leonard, 4 Harr. (Del.) 536; McKinder v. Littlejohn, 4 Ired. (N. C.) 198, in North Carolina the insolvency must be shown to have existed during the whole statutory period.

- 4, *Black v. Carpenter*, 3 Baxt. (Tenn.) 350.
- 5, *Daggett v. Tallman*, 8 Conn. 168; *McClellan v. Crofton*, 6 Me. 334; absence of creditor, *Fladong v. Winter*, 19 Ves. 197.
- 6, *Eby v. Eby*, 5 Pa. St. 435; *Bissell v. Jandon*, 16 Ohio St. 499; *Stout v. Levan*, 3 Pa. St. 235; *Murphy v. Coates*, 33 N. J. Eq. 424. But not as to a co-obligor, *Rogers v. Clements*, 98 N. C. 180. An admission of non-payment may suffice though accompanied by a declaration that the debtor does not intend to pay, *Reed v. Reed*, 46 Pa. St. 239.
- 7, *Tucker v. Baker*, 94 N. C. 162; *Roberts v. Smith*, 21 S. C. 455, acknowledgment of bond thirteen years after maturity.
- 8, *Shields v. Pringle*, 2 Bibb (Ky.) 387; *Wanmaker v. Van Buskirk*, 1 Saxt. Ch. (N. J.) 685; 23 Am. Dec. 748.
- 9, *Hale v. Pack*, 10 W. Va. 145; *Jackson v. Pierce*, 10 Johns. 414; *Bailey v. Jackson*, 16 Johns. 210; 8 Am. Dec. 309; *Dunlop v. Ball*, 2 Cranch 184; *Crooker v. Crooker*, 49 Me. 416, circumstances making it inconvenient for the one to pay and the other to receive.
- 10, *Hall v. Pack*, 10 W. Va. 145.
- 11, *McClellan v. Crofton*, 6 Me. 334.
- 12, *Wanmaker v. Van Buskirk*, 1 Saxt. Ch. (N. J.) 685; 23 Am. Dec. 748.
- 13, *Buie v. Buie*, 2 Ired. (N. C.) 87; *Grantham v. Canaan*, 38 N. H. 268; *Wood v. Dean*, 1 Ired. (N. C.) 230; *Arden v. Arden*, 1 Johns. Ch. (N. Y.) 313; *Abbott v. Godfroy*, 1 Mich. 178; *Foulk v. Brown* 2 Watts (Pa.) 209; *Sutphen v. Cushman*, 35 Ill. 186; *Knight v. Macomber*, 55 Me. 132; *Werbarv v. Austin*, 82 Ala. 498, recognition of trust by trustees; *Wemet v. Mississippi Lime Co.*, 46 Vt. 458, mistake in the acceptance of a security.
- 14, *Gregory v. Com.*, 121 Pa. St. 611; 6 Am. St. Rep. 804, this is especially true if suit is not brought until after the death of the debtor.
- 15, *Palmer v. Dubois*, 1 Mill's Const. (S. C.) 178, suit on bond on which no interest had been paid for twenty-three years.

16, *Rogers v. Judd*, 5 Vt. 236; 26 Am. Dec. 301.

17, *Kirkpatrick v. Laughlin*, 1 Cranch. C. C. 85.

18, *Blake v. Quash*, 3 McCord (S. C.) 340; *Burnside v. Donnon*, 34 S. C. 289.

19, *Gregory v. Com.*, 121 Pa. St. 611; 6 Am. St. Rep. 804; *Bentley's Appeal*, 99 Pa. St. 500.

§ 67. **Presumptions of payment from usual modes of business — Receipts.**— There are certain other presumptions relating to the payment of money which have often been recognized by the courts and which depend upon the known and usual modes of doing business. A familiar illustration is that the production of a *receipt given* by the creditor, raises a presumption of payment.¹ It is immaterial whether the acknowledgment of payment is written out in full in the usual form or whether it is an *indorsement* upon a note, order, check, account or other written instrument.² The familiar rule that *receipts are not conclusive* evidence of the matters which they recite, but are open to rebuttal or explanation, is elsewhere discussed.³ Since, in the ordinary course of dealing, securities are delivered to the debtor when paid or discharged, *possession by the debtor of the evidence of a debt*, as a note, bond, bill or draft, raises the presumption of payment;⁴ and so when a person produces an order upon himself signed by another for the delivery of certain articles, the presumption is that such articles have been delivered.⁵

1, Bish. Cont. sec. 176; *Obart v. Letson*, 17 N. J. L. 78; 34 Am. Dec. 182; *Marston v. Wilcox*, 2 Ill. 270.

2, *Egg v. Barnett*, 3 Esp. 196; *Graves v. Moore*, 7 B. Mon. (Ky.) 341; 18 Am. Dec. 181; *Shropshire v. Long*, 68 Iowa 537; *Harrison v. Harrison*, 9 Ala. 73; *Wooten v. Noll*, 18 Ga. 609; *McAllister v. Engle*, 52 Mich. 56; *Scruggs v. Bibb*, 33 Ala. 481. As to a receipt "in full of all claims," see *Clark v. Simmons*, 4 Port. (Ala.) 14.

3, See sec. 502 *infra*.

4, *Fedens v. Schumers*, 112 Ill. 263; *Chandler v. Davis*, 47 N. H. 462; *Callahan v. First National Bank*, 78 Ky. 604; 39 Am. Rep. 262. For the rule as to a draft, see *Connelly v. McKean*, 64 Pa. St. 113; *Birkey v. McMakin*, 64 Pa. St. 343; *Hayes v. Samuels*, 55 Tex. 560; *Lane v. Farmer*, 13 Ark. 63. For the rule as to an order, see *Ziegler v. Gray*, 12 Serg. & R. (Pa.) 42; *Kincaid v. Kincaid*, 8 Humph. (Tenn.) 17. For the rule as to a note, see *Dougherty v. Deeney*, 41 Iowa 19; *Bracken v. Miller*, 4 Watts & S. (Pa.) 102; *Carroll v. Bowie*, 7 Gill (Md.) 34; *Stieger v. Bent*, 111 Ill. 328; *Potts v. Coleman*, 86 Ala. 94; *Hollenberg v. Lane*, 47 Ark. 394.

5, *Kincaid v. Kincaid*, 8 Humph. (Tenn.) 17.

§ 68. Cancellation of instruments.—

The same presumption arises from the cancellation of a promissory note, check or other instrument, as where the name of the maker is cancelled¹ or torn off,² or where lines are drawn across its face³ or across the face of a mortgage.⁴ Of course this presumption may be rebutted by any competent proof that the cancellation was the result of a mistake or an accident, or that some effect was designed by it different from its ordinary import;⁵ and the presumption arising from cancellation does not arise at all if there is any ground

for *suspicion that it is the act of the debtor*. Thus where a son after the death of his father presented a cancelled note which had been executed by the former, and it appeared that he had a key which fitted his father's desk and thus had access to the note, the court refused to presume that the note had been discharged.⁶ But the possession of an uncanceled note by the debtor, under circumstances free from suspicion, is a strong circumstance in favor of payment and should turn the scale if the other testimony on the issue of payment is conflicting and evenly balanced.⁷ The presumption is not overcome by showing payments by the maker to the payee without further showing that there were no other dealings between the parties upon which such payments might have been made.⁸

1, *Waldrip v. Black*, 74 Cal. 409; *Gray v. Gray*, 2 Lans. (N. Y.) 173; *Peavey v. Hovey*, 16 Neb. 416; *Conway v. Case*, 22 Ill. 127.

2, *Powell v. Swan*, 5 Dana (Ky.) 1.

3, *Pitcher v. Patrick*, 1 Stew. & P. (Ala.) 478.

4, *Trenton Bank v. Woodruff*, 2 N. J. Eq. 117.

5, *Pitcher v. Patrick*, 1 Stew. & P. (Ala.) 478.

6, *Gray v. Gray*, 47 N. Y. 552.

7, *Doty v. Janes*, 28 Wis. 319.

8, *Somervail v. Gillies*, 31 Wis. 152.

§ 69. **Same subject — Application of payments to debts first due.**— When payments are made by a debtor to one who is his

creditor upon distinct transactions or for distinct amounts, and neither party makes an appropriation at the time, it is presumed that the payments are applied to the liabilities of earliest date.¹ From the ordinary course of doing business it is improbable that *former rents* remain unpaid, when it appears that the last installment of rent has been paid; hence it is presumed when payment for a given quarter or other period is shown that all former rents are paid.² This presumption obtains as well where several persons are entitled to receive money as in an individual case, for they are all presumed to be consulant of their rights.³

1, *Crompton v. Pratt*, 105 Mass. 255. See 18 Am. & Eng. Ency. Law 247.

2, *Decker v. Livingston*, 15 Johns. 479; *Attleborough v. Middleborough*, 10 Pick. 378. See also *Robbins v. Townsend*, 20 Pick. 345; Best Ev. sec. 406; Gear Land. & Ten. sec. 138.

3, *Decker v. Livingston*, 15 Johns. 479.

§70. Settlement presumed from accepting note. — Where a party takes up a note on which credits are endorsed and gives a new note for the balance, a settlement of the amounts of the credits is presumed.¹ When payments are shown by the maker to the payee of an outstanding note and the proof shows that there have been no other dealings, proof of the payment of money by the maker to the payee raises the presumption that such

payments were made to apply on the note;² and where a new note is given for a less amount than an old one, in renewal thereof, the presumption is that all the differences between the parties were adjusted and settled by the acceptance of a new note. But this presumption is of course *subject to rebuttal*.³ It is held in some states that the acceptance of a negotiable note or bill of exchange by a creditor in consideration of a preexisting debt is presumed to be a payment of such debt unless a contrary intention is shown;⁴ but by the great weight of authority, including the courts of England and the supreme court of the United States, it is held that such *acceptance of a note or bill is not presumed to discharge the debt*, and that there must be an agreement to that effect before the acceptance of the security can operate as payment. The creditor may return the note when it is dishonored and proceed upon the original debt. The acceptance of the note is considered as accompanied by the condition of its payment;⁵ and the *burden* of an express agreement as to payment *is upon the party asserting it*.⁶ It is the rule which generally prevails that "proof of the giving of a promissory note by one person to another, nothing else appearing, is *prima facie* evidence of an accounting and a settlement of all demands between the parties, and that the maker at the date of the

note was indebted to the payee upon such settlement to the amount of such note. But this is a mere presumption which may be repelled by proofs of the consideration of such note and of the occasion and circumstances attending the giving of the same." ¹ But this view has in some cases been rejected. ²

1, *Greenwade v. Greenwade*, 3 Dana (Ky.) 495.

2, *Somervail v. Gillies*, 31 Wis. 152.

3, *Piper v. Wade*, 57 Ga. 223.

4, *Ely v. James*, 123 Mass. 36; *Ward v. Bourne*, 56 Me. 161; *Paine v. Dwinel*, 53 Me. 52; *Mehlberg v. Tischer*, 24 Wis. 607; *Dickinson v. King*, 28 Vt. 378; *Hoodless v. Reid*, 112 Ill. 105; *Tisdale v. Maxwell*, 58 Ala. 40.

5, *Clark v. Mundel*, 1 Salk. 124; *The Kimball*, 3 Wall. 37; *Peter v. Beverly*, 10 Peters 532; *Tyner v. Stoops*, 11 Ind. 22; 71 Am. Dec. 341 and note; *Vail v. Foster*, 4 N. Y. 312; *Winsted Bank v. Webb*, 39 N. Y. 325; 100 Am. Dec. 435; *Ward v. How*, 38 N. H. 35; *Matteson v. Ellsworth*, 33 Wis. 488; *Berry v. Griffin*, 10 Md. 27; 69 Am. Dec. 123 and note; *Tied. Com. Pap. sec. 379*.

6, 18 Am. & Eng. Ency. Law 171 and cases cited.

7, *Dan. Neg. Inst. sec. 71*; *Ankeny v. Pierce, Breese* (Ill.) 289; 12 Am. Dec. 174.

8, *Ankeny v. Pierce, Breese* (Ill.) 289; 12 Am. Dec. 174; *Crabtree v. Rowland*, 33 Ill. 421.

§ 71. Presumption of ownership from possession.—It is an ancient principle of law that when a person is shown to be in the possession of property, such possession is presumed to be rightful. *Potior est conditio possidentis*.¹ Among other grounds which have been assigned for this presumption are

these: that it is in accord with the general principles of law to suppose, until the contrary is shown, that possession is lawful rather than unlawful; that since the rightful owners of property are not likely to consent that their property remain in the continued possession of others who assert title thereto, it is a natural conclusion that possession of this character is authorized by some grant or license; and finally, as stated by Judge Story, "presumptions of this character are adopted from the general infirmity of human nature, the difficulty of preserving the muniments of title and the public policy of supporting long and uninterrupted possession."² In a great variety of cases the peaceable *possession of personal property* has been held to create a presumption of ownership, for example *trespass*,³ *replevin*⁴ and *trover*⁵ may be sustained by one having bare possession against a stranger or wrongdoer. A familiar English case illustrates this principle; a chimney sweeper's boy, having found a jewel, carried it to a goldsmith to ascertain its value, but the goldsmith by his apprentice detained it and refused to restore it. The boy having brought *trover*, it was held that his possession was some evidence of property, good against any one except the true owner; that he could maintain *trover* for it on such *prima facie* proof of title, and that refusal to restore it on demand was evidence of conver-

sion.⁶ On the same principle proof of possession in a *bailee* or other person having some special title is *prima facie* evidence of title.⁷ So it is a familiar rule that the possession of *negotiable paper* payable to bearer or order and endorsed by the payee in blank affords a presumption of ownership;⁸ and it is the general effect of a *bill of lading* to raise a presumption of property in goods in the consignee.⁹ But the presumption of title arising from possession does not obtain in favor of one who *unlawfully* takes property from the possession of another, when an action is brought for its recovery or conversion,¹⁰ nor does it apply in favor of one whose possession is of a *subordinate character* as that of an avowed agent, the possession in that case being that of the employer.¹¹ Where one occupies the farm and uses the farm implements and teams of another, no presumption arises from such possession as to the ownership of the growing crops.¹² From the nature of this presumption it may be easily rebutted and it affords no protection to one who purchases property or otherwise obtains it from one who is not the real owner.¹³

1, 2 Inst. 391; Broom Leg. Max. p. 719.

2, Ricard v. Williams, 7 Wheat. 109; University of Vermont v. Reynolds, 3 Vt. 542; 23 Am. Dec. 234; Jackson v. McCall, 10 Johns. 377; 6 Am. Dec. 343; Doe v. Reed, 5 Barn. & Ald. 232.

3, Hoyt v. Gelston, 13 Johns. 141; Graham v. Peat, 1

East 244; Orser v. Storms, 9 Cow. 687; 18 Am. Dec. 543 and note; Cooley Torts 511.

4, Schulenberg v. Harriman, 21 Wall. 44; Horsey v. Knowles, 74 Md. 602. The presumption is admitted and the burden assumed by the plaintiff when he brings suit.

5, Duncan v. Spear, 11 Wend. 54; Orser v. Storms, 9 Cow. 687; 18 Am. Dec. 543 and note; Magee v. Scott, 9 Cush. 148; 55 Am. Dec. 49.

6, Armory v. Delamirie, 1 Str. 505.

7, Sutton v. Buck, 2 Taunt. 302; Faulkner v. Brown, 13 Wend. 63 and cases; Cowing v. Snow, 11 Mass. 415; Cooley Torts 572.

8, Dan. Neg. Inst. sec. 573; Rubey v. Culbertson, 35 Iowa 264; Bachellor v. Priest, 12 Pick. 399; Cone v. Brown, 15 Rich. (S. C.) 262; Mars v. Mars, 27 S. C. 132; James v. Chalmers, 6 N. Y. 209; Jackson v. Love, 82 N. C. 405; Collins v. Gilbert, 94 U. S. 753; Perot v. Cooper, 17 Col. 80; 31 Am. St. Rep. 258 and note. The rule is not the same, however, as to unindorsed negotiable paper, Vastine v. Wilding, 45 Mo. 89; 100 Am. Dec. 347 and note. On this general subject see full note, 17 L. R. A. 326.

9, Lawrence v. Minturn, 17 How. 107.

10, Cumberledge v. Cole, 44 Iowa 181; Weston v. Higgins, 40 Me. 102; Price v. Powell, 3 N. Y. 322.

11, Linstott v. Frask, 35 Me. 150; Succession of Boisblanc, 32 La. An. 109; Perkins v. Weston, 3 Cush. 549.

12, Rawley v. Brown, 71 N. Y. 85; Comer v. Comer, 120 Ill. 420; Stacy v. Graham, 3 Duer (N. Y.) 444; Bailey v. Steamer, 2 Cal. 370.

13, Velsian v. Lewis, 15 Ore. 539; 3 Am. St. Rep. 184 and elaborate note.

§ 72. The presumption of title from the possession of lands.—Although as has been seen the presumption under discus-

sion is often applied in the law of personal property, its application is far more important as affecting titles to land. From an early period of the common law the courts seem to have delighted in some relaxation of the strict rules of evidence in favor of those who had long been in the enjoyment of those easements and franchises which could be created by grant without record. In later times the courts of this country have indulged in similar favors to those in the possession of corporeal hereditaments. One of the most common muniments of title to real estate is the presumption from long possession, that such possession is lawful rather than unlawful,—in other words that it is supported by a grant. It has become a well established rule that the peaceable possession of real estate is presumptive evidence of title until the contrary is shown;¹ and such possession under the claim of right will suffice to maintain *ejectment*² or *trespass* against a mere intruder or wrongdoer. The actual peaceful possession is sufficient evidence of title against everyone who can not show a better right, since such possession is presumed to be rightful.³ It has been sometimes said that possession gives rise to the presumption of seisin in fee,⁴ but, since possession is quite as consistent with a subordinate title like a leasehold as with seisin in fee, it is more accurate to say that when possession is *accompanied by the claim of*

ownership in fee such ownership is presumed.¹ When possession of real estate has existed uninterruptedly for a long period of years the courts have uniformly regarded the presumption of ownership as greatly strengthened. So strongly have the courts favored titles fortified by long possession that it has been said: "An act of parliament, a grant from the crown, a deed and in fact anything which will quiet a possession may be presumed from length of time where such act, grant or deed would have been lawfully passed, made or given."²

1, *Plume v. Seward*, 4 Cal. 94; 60 Am. Dec. 599; *Jackson v. Town*, 4 Cow. 599; 15 Am. Dec. 405; *Smith v. Lorillard*, 10 Johns. 339; *Austin v. Bailey*, 37 Vt. 219; 86 Am. Dec. 703; *Wausau Boom Co. v. Plumer*, 35 Wis. 274; *Bagley v. Kennedy*, 85 Ga. 703; *Tuttle v. Jackson*, 6 Wend. 213; 21 Am. Dec. 306; *Eakin v. Brewer*, 60 Ala. 578; *Hicks v. Davis*, 4 Cal. 67; *Jones v. Nunn*, 12 Ga. 472; *Day v. Alver son*, 9 Wend. 223; *De Noon v. Morrison*, 86 Cal. 163, as to mining claims.

2, *Plume v. Seward*, 4 Cal. 94; 60 Am. Dec. 599 and note; *Bates v. Campbell*, 25 Wis. 615; *Moore v. Railway Co.*, 78 Wis. 120; *Cain v. McCann*, 2 Pen. (N. J.) 438; 4 Am. Dec. 384; *Warner v. Page*, 4 Vt. 291; 24 Am. Dec. 607; *McCall v. Doe*, 17 Ala. 533; *Jacks v. Dyer*, 31 Ark. 334; *Hutchinson v. Perley*, 4 Cal. 33; 60 Am. Dec. 578; *Doe v. Lancaster*, 5 Ga. 39; *Mettler v. Miller*, 129 Ill. 630; *Kerr v. Farish*, 52 Miss. 101; *Murphy v. Loomis*, 26 Hun 659; 6 Am. & Eng. Ency. Law 227 and cases cited; 2 Wat. Tresp. sec. 909.

3, *Elliott v. Kemt*, 7 M. & W. 312; *Heath v. Williams*, 25 Me. 209; 43 Am. Dec. 265; *Hayward v. Sedgley*, 14 Me.

439; 31 Am. Dec. 64; Evertson v. Sutton, 5 Wend. 281; 21 Am. Dec. 217; Elofrson v. Lindsay, (Wis.) 63 N. W. Rep. 89.

4, Asher v. Whitlock, L. R. 1 Q. B. 1; Day v. Alverson, 9 Wend. 223.

5, Ward v. McIntosh, 12 Ohio St. 231; LaFrombois v. Jackson, 8 Cow. 603; 18 Am. Dec. 463; Adams v. Guice, 30 Miss. 397; Ricard v. Williams, 7 Wheat. 59; Jackson v. Porter, 1 Paine (U. S.) 457. In some states it is held that mere naked possession, unless continued for such time as gives title under the statute of limitations, will not sustain ejectment, Doe v. Howell, 1 Houst. (Del.) 178; Breeding v. Taylor, 13 B. Mon. (Ky.) 477; Alexander v. Campbell, 74 Mo. 142.

6, University of Vermont v. Reynolds, 3 Vt. 542; 23 Am. Dec. 234, 242; Nixon v. Carco, 28 Miss. 414; Lawson Pres. Ev. 410.

§ 73. Presumptions as to grants and other sources of title.—Mr. Stephen in his work on evidence lays down the following rule as to the presumption of lost grants: "When it has been shown, that any person, for a long period of time, exercised any proprietary right which might have had a lawful origin by grant or license from the Crown or from a private person, and the exercise of which might and naturally would have been prevented by the persons interested if it had not had a lawful origin, there is a presumption that such right had a lawful origin and that it was created by a proper instrument which has been lost."¹ Accordingly when it is shown that there has been adverse possession for twenty years or for the period fixed

by the statute of limitations, though it be less than twenty years, it will be presumed that the possessor or some grantor had a deed and that all acts necessary to give it effect had been performed.² In such cases the grant is presumed on principles of public policy, and not from any belief that a deed has actually been made. Hence, where the evidence is sufficient to warrant the legal inference of a grant the jury may presume such a grant, though they may not believe that it was in fact made;³ it is sufficient if by legal possibility a grant might have been made.⁴ On the same principle deeds of partition may be presumed to have been executed when the several joint owners of land have for a long time held possession of separate tracts.⁵ When contracts for the sale of land have been made and the vendee has taken possession and paid the purchase money, conveyances have been presumed.⁶

1, Steph. Ev. art. 100.

2, *Courcies v. Graham*, 1 Ohio 330; *Wallace v. Fletcher*, 30 N. H. 434; *Downing v. Ford*, 9 Dana (Ky.) 391; *Brattle Square Church v. Bullard*, 2 Met. 363; *Rooker v. Perkins*, 14 Wis. 79. The doctrine is illustrated by a great many cases where possession had been held for different periods: *Emans v. Turnbull*, 2 Johns. 313, one hundred years; *Strimpfler v. Roberts*, 18 Pa. St. 283; 57 Am. Dec. 606, twenty-one years; *Doe v. Maxwell*, 10 Ired. (N. C.) 110; 51 Am. Dec. 380, thirty years; *Newman v. Studley*, 5 Mo. 291, twenty-six years; *McNair v. Hunt*, 5 Mo. 300, thirty years.

3, *Casey v. Inloes*, 1 Gill (Md.) 430; 39 Am. Dec. 658; *Fletcher v. Fuller*, 120 U. S. 534 and cases cited.

4, *Williams v. Donell*, 2 Head (Tenn.) 695.

5, *Hepburn v. Auld*, 5 Cranch 262; *Monroe v. Gates*, 48 Me., 463; *Russell v. Marks*, 3 Met. (Ky.) 37; *Lloyd v. Gordon*, 2 Har. & McH. (Md.) 254; *Jackson v. Miller*, 6 Wend. 228; 21 Am. Dec. 316.

6, *Jackson v. Murray*, 7 Johns. 5.

§ 74. Other illustrations of the rule.—Acts of parliament and of the legislature may be presumed to support a title after long possession, even though the public records furnish no evidence of such act; but there could be no presumption of such an act if, under the constitution of the state, no such act could be properly passed.¹ Where possession for the requisite time has been shown and also that during the time certain conditions have been performed by those in possession, it may be presumed that there was a grant on condition.² In ejectment, where the defendant has had long possession, the presumption is not limited to a grant from the plaintiff but it may be of a grant from his remote grantor.³ After long possession of land under a deed executed in the name of an agent it will be presumed that he had authority from the principal.⁴ Other illustrations in which presumptions have been applied are, that after long user a ferry had a legal origin;⁵ that the record of a statute of incorporation had been lost;⁶ that after long enjoyment there had

been a grant of fishery,⁷ or of a right of way,⁸ or of the right to hold meetings in a parish house;⁹ that a power of attorney had existed where a deed had been made by one purporting to be by an attorney,¹⁰ or that a lease in fee¹¹ or for life,¹² or a grant of water flowing through an aqueduct, had been executed.¹³ The presumption has often been applied in cases where there has been adverse possession of water courses, not navigable, or of land overflowed on account of the erection of dams;¹⁴ but this rule has no application to underground waters percolating or filtering through the earth.¹⁵ It is also presumed that, where there are several in possession, the law refers the possession to the one who has the title;¹⁶ that the soil of one owner is entitled to the natural support of the adjoining soil,¹⁷ and that one who has allowed the continuous use of his land as a highway has intended to dedicate the same.¹⁸ Grants may be presumed from the government as well as from individuals and upon the same principle; although since it has during the present century been the custom to preserve careful records of such grants there can be little occasion to apply the rule except as in relation to the earlier grants.¹⁹

1, *Attorney General v. Hospital*, 17 Beav. 366; *McCarty v. McCarty*, 3 Strob. (S. C.) 6; 47 Am. Dec. 585; *Lopez v. Andrew*, 3 Man. & Ry. 329 and note.

2, *Watkins v. Peck*, 13 N. H. 360; 40 Am. Dec. 156; *Mitchell v. Walker*, 2 Aikens (Vt.) 266; 16 Am. Dec. 710.

- 3, *Casey v. Inloes*, 1 Gill (Md.) 430; 39 Am. Dec. 658.
- 4, *Jarboe v. McAtee*, 7 B. Mon. (Ky.) 279; *Farrow v. Edmundson*, 4 B. Mon. (Ky.) 605; 41 Am. Dec. 250; *Stockbridge v. West Stockbridge*, 14 Mass. 257.
- 5, *Trotter v. Harris*, 2 Younge & J. 285; *Bird v. Smith*, 8 Watts (Pa.) 434; *Smith v. Hawkins*, 3 Ired. Eq (N. C.) 613; 44 Am. Dec. 83.
- 6, *Stockbridge v. West Stockbridge*, 12 Mass. 400.
- 7, *Melvin v. Whiting*, 10 Pick. 295; 20 Am. Dec. 524; *Carter v. Tinicum Fishing Co.*, 77 Pa. St. 310.
- 8, *Hill v. Crosby*, 2 Pick. 466.
- 9, *Goff v. Rehoboth*, 12 Met. 26.
- 10, *Buhols v. Boudousquie*, 6 Mart. N. S. (La.) 153; *Doe v. Campbell*, 10 Johns. 475.
- 11, *Ham v. Schuyler*, 4 Johns. Ch. (N. Y.) 1.
- 12, *Sellick v. Starr*, 5 Vt. 255.
- 13, *Watkins v. Peck*, 13 N. H. 360; 40 Am. Dec. 156.
- 14, *Bealy v. Shaw*, 6 East 208; *Magor v. Chadwick*, 11 Adol. & Ell. 571; *Watkins v. Peck*, 13 N. H. 360; 40 Am. Dec. 156; *Bullen v. Runnels*, 2 N. H. 255; 9 Am. Dec. 55; *Strickler v. Todd*, 10 Serg. & R. (Pa.) 63; 13 Am. Dec. 649; *Campbell v. Smith*, 3 Halst. (N. J.) 140; 14 Am. Dec. 400. But see *Seidensparger v. Spear*, 17 Me. 123; 35 Am. Dec. 234; *Hall v. Augsburg*, 46 N. Y. 622; *Stiles v. Hooker*, 7 Cow. 266; *Tonkman v. Arnold*, 3 Me 120.
- 15, *Frazier v. Brown*, 12 Ohio St. 294; *Chasemore v. Richards*, 7 H. L. Cas. 349.
- 16, *Maples v. Maples*, Rice Ch. Cas. 300.
- 17, *Humphries v. Brogden*, 12 Q. B. 739; *Harris v. Ryding*, 5 M. & W. 60; *Roberts v. Haines*, 6 El. & B. 643; *Rowbotham v. Wilson*, 6 El. & B. 593.
- 18, *Wyman v. State*, 13 Wis. 663; *Reg. v. East Mark*, 11 Q. B. 877; *Rex v. Petrie*, 24 L. J. Q. B. 167; 2 Beach Pub. Corp. sec. 1451 and cases.
- 19, *Oaksmith v. Johnston*, 92 U. S. 343.

• **§ 75. Presumption not superseded by statutes of limitation.**—Originally this presumption of title from possession was applied only to incorporeal hereditaments, but it is now well settled that the same presumption will arise whether the grant relates to *corporeal or incorporeal hereditaments*.¹ Nor is this rule changed by the fact that, in most cases where possession is relied upon as a source of title to lands and tenements, the statute of limitations of the jurisdiction affords a sufficient guide.² The party relying on his possession may of course call to his aid the statute of limitations where it is applicable and if he relies upon the statute the proofs must show compliance with its provisions.³ But the *statutes of limitation do not supersede the common law presumption* and, if this is relied upon, possession for less than the period prescribed by the statute may with other cogent circumstances sustain the claim of a conveyance or of a lost grant. The length of time which brings a given case within the legal presumption of a grant or charter to validate a right long enjoyed is not definite but depends on its peculiar circumstances.⁴ It may be necessary to seek the aid of this presumption in some cases where the *statute of limitations does not apply*, as where it is urged against the state or when from some peculiar relations of the parties there could not have been adverse possession

originally, or where the presumption may be relied upon to supply a conveyance or other missing link, or where it relates to an incorporeal hereditament or to an easement.⁵

1, Ricard v. Williams, 7 Wheat. 59; Fletcher v. Fuller, 120 U. S. 534; Arnold v. Stevens, 24 Pick. 106; 35 Am. Dec. 305.

2, Ricard v. Williams, 7 Wheat. 59; Fletcher v. Fuller, 120 U. S. 534.

3, Lowe v. Carpenter, 6 Exch. 825; Eldridge v. Knott, 1 Cowp. 214.

4, Bright v. Walker, 1 Crompt., M. & R. 211; Stamford v. Dunbar, 13 M. & W. 822; Hanmer v. Chance, 4 De Gex, J. & S. 626; Fletcher v. Fuller, 20 U. S. 534; Ricard v. Williams, 7 Wheat. 59, 110. But see Townsend v. Towner, 32 Vt. 183.

5, Cowen & Hill's notes to Phil. Ev. and cases, note 298.

§ 76. Presumption that trustees have made proper conveyances. — On the same principle it may be stated as a rule of much importance and of quite general application that, when a person in possession of any property is shown to be entitled to the beneficial ownership thereof, there is a presumption that every instrument has been executed which it was the legal duty of his trustees to execute in order to perfect his title.¹ The circumstances which should concur to raise this presumption as to the trustee are the following: (1) It must have been the duty of the trustee to convey. (2) There must be sufficient reason to justify the presumption.

(3) The object of the presumption must be to support a just title.² In this class of cases where the period has elapsed during which the trustees should have conveyed, it is not necessary that twenty years or any other certain period should have expired.³ It is a familiar rule that in general *length of time is no bar to a trust* whose existence has been clearly proved; and where fraud is imputed and proved, no length of time ought to exclude relief. But as length of time obscures evidence and deprives parties of the means of ascertaining the nature of the original transactions it operates by way of presumption in favor of innocence and against the imputation of fraud. Accordingly in a leading case it was held that the lapse of forty years, together with the death of all the original parties, was sufficient to warrant a presumption of the discharge and extinguishment of a trust proved to have existed by strong circumstances. This is by analogy to the rule of law which after a lapse of time presumes the payment of a debt, the surrender of a deed and the extinguishment of a trust where circumstances may reasonably justify it.⁴

1, Steph. Ev. art. 101; Doe v. Cooke, 6 Bing. 174; Jackson v. Cole, 4 Cow. 587; Jackson v. Moore, 13 Johns. 513; Marr v. Gilliam, 1 Cold. (Tenn.) 488; Tyler v. Herring, 67 Miss. 169; 19 Am. St. Rep. 263 and note. For discussion of the rule with qualifications see Doggett v. Hart, 5 Fla. 215; 58 Am. Dec. 464 and note.

2, Hill Trust. 253; Perry Trusts sec. 350; Doggett v. Hart, 5 Fla. 215; 58 Am. Dec. 464 and note.

3, Jackson v. Woolsey, 11 Johns. 446; England v. Slade, 4 T. R. 682. See cases and discussion, Cowen & Hill's notes to Phil. Ev. note 298.

4, Prevost v. Gratz, 6 Wheat. 481.

§ 77. **Nature of the possession required.**—It now becomes necessary to discuss the nature of the possession which creates the presumption that a grant has been made or that some other missing link to the title has been supplied. Though as has been seen the courts have been ready to relax the strict rules of evidence in favor of long possession, they have sought to apply this presumption, not capriciously, but in conformity with uniform rules. It is clear that the burden is upon the one, who claims title by adverse possession against a documentary title, to prove such possession for the requisite time by *clear and satisfactory evidence*. It will not be presumed.¹ Indeed it has been said that the possession should be proved beyond a reasonable doubt.² But there seems to be no good reason for requiring the strictness of proof demanded in the criminal law. The possession must be *actual and not constructive* in its nature; while the payment of taxes and similar acts of control may be evidence of the claim of right, they are not alone sufficient evidence of possession within the meaning of the rule.³ Moreover, the possession must be *hos-*

title in its inception and *exclusive* and it must continue uninterruptedly under a claim of right to the boundaries of the land claimed;⁴ and where the title is evidenced by possession only, it must be limited to the claim asserted;⁵ so where a party is in actual possession and has right to possession under a legal title which is not adverse, but claims the possession under another title which is adverse, the possession will not be presumed to be adverse.⁶ The possession should be accompanied with such acts of ownership as persons usually exercise over their own lands, such acts that the owner knowing of them must be deemed to understand that a claim is made adverse to his own.⁷

1, *Baldwin v. Buffalo*, 35 N. Y. 375; *Budd v. Brooke*, 3 Gill (Md.) 198; 43 Am. Dec. 321; *Casey v. Inloes*, 1 Gill (Md.) 430; 39 Am. Dec. 658; *Hurst's Lessee v. McNeil*, 1 Wash. C. C. 70.

2, *Rowland v. Updike*, 28 N. J. L. 101.

3, *Jackson v. Myers*, 3 Johns. 388; 3 Am. Dec. 504; *Pharis v. Jones*, 122 Mo. 125; *Pendleton v. Snyder*, 5 Tex. Civ. App. 427.

4, *Brandt v. Ogden*, 1 Johns. 156; *Williams v. Donell*, 2 Head (Tenn.) 695; *Arnold v. Stevens*, 24 Pick. 106; 35 Am. Dec. 305; *Armstrong v. Risteau*, 5 Mich. 256; 59 Am. Dec. 115. As to slight interruptions not interfering with the presumption, see *Fletcher v. Fuller*, 120 U. S. 534.

5, *Ricard v. Williams*, 7 Wheat. 59.

6, *Nichols v. Reynolds*, 1 R. I. 30; 36 Am. Dec. 239.

7, *Doe v. Maxwell*, 10 Ired. (N. C.) 110; 51 Am. Dec. 380; *Bailey v. Carleton*, 12 N. H. 9; 37 Am. Dec. 190; *Pownal v. Taylor*, 10 Leigh (Va.) 172; 34 Am. Dec. 725; *Colvin v. Warford*, 20 Md. 357.

§ 78. Same — Changes in possession — Possession by tenant.—Where there is evidence of a prescriptive claim extending over a long time, the presumption of right will not be defeated by proof of slight, partial or occasional variations in the exercise or the extent of the right claimed.¹ *Slight changes* in the nature or extent of long possession are almost inevitable; and when by the lapse of years the evidence is lost by which such changes or irregularities might be explained, the courts cannot scrutinize such ancient possession as strictly as they might a modern grant. It has, therefore, always been the well established principle of our law to presume everything in favor of long possession and it is everyday practice to rest the title to the most valuable properties upon this foundation.² While the possession must be open and such as subjects the premises to the dominion of the possessor, such control may be exercised through the agency of a *tenant* or another recognizing the right of the one claiming control.³ Although the exclusive possession of one tenant in common is presumed not to be adverse to the co-tenant, but rather for his benefit,⁴ yet the ouster of the co-tenant may be proved and may be inferred from such circumstances as claiming the whole rent, by denying the right of the other party or by abandonment by those not in posses-

sion; in such cases it may be a question for the jury whether the possession has become adverse,⁵ and whether there has been a grant.⁶ "A mere *tortious possession*, however, obtained by violence is not possession in the meaning of the rule before us; and, against such a wrongdoer, the party wrongfully dispossessed may make out a *prima facie* case in an action of ejectment, on proof of a prior possession however short."⁷

1, Reg. v. Archdall, 8 Adol. & Ell. 281; Welcome v. Upton, 6 M. & W. 536; Fletcher v. Fuller, 120 U. S. 534.

2, Reg. v. Archdall, 8 Adol. & Ell. 281.

3, Barstow v. Newman, 34 Cal. 90; McLawrin v. Salmons, 11 B. Mon. (Ky.) 96; 52 Am. Dec. 563.

4, Coke Litt. 199; Colburn v. Mason, 25 Me. 434; 43 Am. Dec. 292; McClung v. Ross, 5 Wheat. 116; Dubois v. Campaw, 28 Mich. 304; Phillipps v. Gregg, 10 Watts (Pa.) 158; 36 Am. Dec. 158. See also Wilcox v. Leominster Bank, 43 Minn. 541; 19 Am. St. Rep. 259.

5, Meredith v. Andres, 7 Ired. (N. C.) 5; 45 Am. Dec. 504; Harmon v. James, 7 Smedes & M. (Miss.) 111; 45 Am. Dec. 296. See also Bolton v. Hamilton, 5 Watts & Serg. (Pa.) 294; 37 Am. Dec. 509.

6, Hepburn v. Auld, 5 Cranch. 262; Kingston v. Lesley, 10 Serg. & R. (Pa.) 383.

7, Asher v. Whitelock, L. R. 1 Q. B. 1; Clifton v. Lilley, 12 Tex. 130; White v. Cooper, 8 Jones (N. C.) 48; Weston v. Higgins, 40 Me. 102.

§ 79. The presumption, how rebutted. It follows logically from the foregoing discussion that long continued possession of corporeal or incorporeal hereditaments only fur-

nishes a presumption of a legal title, which may be repelled or rebutted by other circumstances, as that the use was not exercised as a right,¹ for example, that the use was *permissive* and accompanied by the payment of rent;² that it was under some written instrument inconsistent with an adverse user;³ that the adverse use was *not acquiesced in* and was contested, or that possession was taken by virtue of some qualified interest or estate less than a claim of an absolute title or subordinate to the rights of the owner.⁴ Where the presumption of a grant is raised by parol evidence, it may be rebutted by evidence of the same kind.⁵

1, Hall v. McLeod, 2 Met. (Ky.) 98; 74 Am. Dec. 400; Watkins v. Peck, 13 N. H. 360; 40 Am. Dec. 156.

2, McCullough v. Wall, 4 Rich. L. (S. C.) 68; 53 Am. Dec. 715; County of Susquehanna v. Deans, 33 Pa. St. 131.

3, Nieto v. Carpenter, 21 Cal. 455; Field v. Brown, 24 Gratt. (Va.) 74.

4, Farrow v. Edmundson, 4 B. Mon. (Ky.) 605; 41 Am. Dec. 250; Chiles v. Conley, 2 Dana (Ky.) 21.

5, English v. Doe, 7 Ga. 387.

§ 80. Same — Disabilities — Nature of estate — What facts are relevant. — This presumption does not arise when the owner is under a disability from insanity or other cause;¹ nor does it arise against remaindermen or reversioners during the continuance of the particular estate.² An owner in possession is *presumed to hold under his fee un-*

til it is shown that he holds under an estate adverse and not subordinate to his fee. Thus where a widow had held long possession under a deed in fee from one of her husband's heirs for an undivided part of the land, it was held that no presumption could arise against the deed that she held as tenant in dower.³ The possession of one defendant is of no avail to a co-defendant as creating a presumption where they claim under distinct titles.⁴ There are various circumstances which may be relevant as showing whether or not the possession has been hostile and adverse, as the absence of the owner and his consequent ignorance of the adverse claim, or the unsettled condition of the country and consequent lack of notoriety of the claim.⁵ But the presumption is not necessarily defeated by the mere ignorance or inattention of the owner as to the adverse claim, as the use may continue so long without objection as to warrant the inference of an implied consent or of a grant.⁶ And it has been held that the presumption of a grant from long adverse possession was not rebutted by the fact that there was a prevalent opinion in the neighborhood as to the party's legal rights.⁷

1, *Hunt v. Hunt*, 3 Met. 175; 37 Am. Dec. 130; *Watkins v. Peck*, 13 N. H. 360; 40 Am. Dec. 156; *Mitchell v. Owings*, 2 Mar. h. (Ky.) 312; *Demarest v. Wynkoop*, 3 Johns. Ch. (N. Y.) 129; 8 Am. Dec. 467.

2, *McCarenny v. King*, 3 *Humph. (Tenn.)* 267; 39 *Am. Dec.* 165; *Tinney v. Wolston*, 41 *Ill.* 215.

3, *Hale v. Portland*, 4 *Me.* 77.

4, *Casey v. Inloes*, 1 *Gill (Md.)* 430; 39 *Am. Dec.* 658.

5, *Mitchell v. Ownings*, 3 *Marsh. (Ky.)* 312; *Hurst's Lessee v. McNeil*, 1 *Wash. C. C.* 70; *Bethum v. Turner*, 1 *Greenl. (Me.)* 115.

6, *Reimer v. Stuber*, 20 *Pa. St.* 458; *Warren v. Jacksonville*, 15 *Ill.* 236; 58 *Am. Dec.* 610.

7, *Casey v. Inloes*, 1 *Gill (Md.)* 430; 39 *Am. Dec.* 658.

§ 81. Presumption as to the law of sister states.—It often happens that a question arises in the courts as to the law prevailing in some other state than that of the forum, where no evidence has been given on the subject. As appears from the discussion in another section the courts do not in such cases take judicial notice of the foreign law.¹ It has been frequently declared without qualification that, in such cases, the law of the sister state will be presumed to be the same as the law of the forum.² It will be found, however, that in many of the cases where this rule has been declared the court was dealing with common law doctrines and not with *statutory law*. Among the illustrations which might be given: It has been presumed in the absence of all proof that in another state the common law prevails as to champerty,³ as to the negotiability of promissory notes,⁴ as to the effect of giving a note on a pre-existing debt,⁵ as to the allowance of days of grace on nego-

liable paper,⁶ as to the validity of a marriage solemnized by a priest and followed by cohabitation,⁷ as to the invalidity of an insurance policy upon a life in which the insurer had no interest⁸ and as to the invalidity of a contract made without consideration.⁹ So it will be presumed that the common law is in force in a sister state, as to the passing of title to personal property to the personal representative,¹⁰ and in general as to the rights of property,¹¹ and as to the liability of common carriers.¹² Since the common law did not allow interest, except on contract to pay interest, it will be presumed that interest is not recoverable in another state unless there is proof of a statute or of an agreement.¹³ So where an action is brought in one state by a wife for the wrongful or negligent killing of her husband in another state, she must prove the existence of a statute in such other state creating the liability.¹⁴

1, As to proof of laws of other states, see secs. 119 and 516 *infra*.

2, *Rape v. Heaton*, 9 Wis. 328; *Hull v. Augustine*, 23 Wis. 383; *Cutler v. Wright*, 22 N. Y. 472; *Smith v. Whitaker*, 23 Ill. 367; *Kermott v. Ayer*, 11 Mich. 181; *White v. Friedlander*, 35 Ark. 52; *Osborn v. Blackburn*, 78 Wis. 209; 23 Am. St. Rep. 400; *Brimhall v. Van Campen*, 8 Minn. 13; 82 Am. Dec. 118; *Petersen v. Chemical Bank*, 32 N. Y. 21; 88 Am. Dec. 298; *Com. v. Graham*, 157 Mass. 73; 34 Am. St. Rep. 255. See full notes on the general subject, 89 Am. Dec. 658; 11 Am. Dec. 779; 21 L. R. A. 467; also article by W. W. Thornton, 2 Am. Law Jour. 363.

3, *White v. Knapp*, 47 Barb. 549; *Houghtaling v. Ball*,
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19 Mo. 84; *Miles v. Collins*, 1 Met. (Ky.) 311; *Thurston v. Percival*, 1 Pick. 415.

4, *Newton v. Cocke*, 10 Ark. 169; *Dunn v. Adams*, 1 Ala. 527; 35 Am. Dec. 42; *Ellis v. Maxson*, 19 Mich. 186; 2 Am. Rep. 81; *White v. Knapp*, 47 Barb. 549; *Houghtaling v. Ball*, 19 Mo. 84; *Forbes v. Scannell*, 13 Cal. 242; *Bundy v. Hart*, 46 Mo. 460. As to the law of indorsement, see *Dubois v. Mason*, 127 Mass. 37; 34 Am. Rep. 335.

5, *Ely v. James*, 123 Mass. 36.

6, *Ruse v. Mutual Benefit Life Ins. Co.*, 23 N. Y. 516; *Walsh v. Dart*, 12 Wis. 635; *Lucas v. Sadew*, 28 Mo. 342.

7, *Com. v. Kenney*, 120 Mass. 387; *Raynham v. Canton*, 3 Pick. 293; *Hynes v. McDermott*, 82 N. Y. 41.

8, *Ruse v. Mutual Benefit Life Ins. Co.*, 23 N. Y. 516.

9, *Crouch v. Hall*, 15 Ill. 263. As to the rights of married women, *State v. Clay*, 100 Mo. 571.

10, *Reese v. Harris*, 27 Ala. 301. See also as to the powers of administrators, *Rogers v. Zook*, 86 Ind. 237.

11, *Connor v. Travick*, 37 Ala. 289; 79 Am. Dec. 58; *Silver v. Kansas City Ry.*, 21 Mo. App. 5; *Cressey v. Tatom*, 9 Ore. 541; *Richards v. Marley*, 80 Ind. 185.

12, *Eureka Springs Co. v. Timmans*, 51 Ark. 459.

13, *Thompson v. Morrow*, 2 Cal. 99; 56 Am. Dec. 318; *Hudson v. Daily*, 13 Ala. 722.

14, *Palfrey v. Portland Ry. Co.*, 4 Allen 55, injury in Maine, no statute in either state creating the liability. So as to other actions for negligence, *Whitford v. Panama Ry. Co.*, 23 N. Y. 465; *Leonard v. Columbia Co.*, 84 N. Y. 48; 38 Am. Rep. 491; *State v. Pittsburg Co.*, 45 Md. 41.

§ 82. Same subject — Limitations. —
Undoubtedly there are some limitations to be added to the general statement so often made, that the law of the sister state will be presumed to be the same as that of the forum,¹ for example, it has been repeatedly held that

there will be no presumption in a state where penalties or forfeitures are imposed for usury, that similar laws exist in another state,² though in the absence of proof on the subject it has been held in some of the states that the law of interest in another state will be presumed to be the same as in that of the state in which the court is held.³ It will not be presumed that the law of another state requires contracts for the sale of land to be in writing, since at common law such parol contracts were valid.⁴ In Massachusetts in an action on a note made and delivered on Sunday in the state of New York, no proof was made of the New York law and, since such a note was valid at common law, the court sustained a judgment for the plaintiff, and indulged in no presumption that the statute of New York was the same as that of Massachusetts.⁵ Where there was an agreement, which was made in Virginia, to advertise a lottery in New York, it was sustained in New York since there was no presumption that Virginia had a statute declaring lotteries illegal similar to that of New York.⁶ By the greater number of decisions the rule seems to be maintained that the law of a sister state, including the statutory law, in the absence of proof, should be presumed to be the same as that of the forum;⁷ but we have seen that some limitations as to this rule exist, and there is very high authority indeed for the view that while

the presumption under discussion extends to *the common law rules* it does not apply to the *statutory law* of another state. It has often been declared, and with much force, that it cannot be presumed that the legislature of another state has adopted all the statutes of the state of the forum, and that the court should have proof before it can assume that such statutes have been passed.⁸ But whatever may be the presumptions to be indulged, the party who seeks to avail himself of the statute of another state should prove it; otherwise the court will apply the law of the jurisdiction.⁹

1, As to this general subject see annotated cases cited in note 2 to last section; also note, 37 Am. Rep. 583.

2, Grider v. Driver, 46 Ark. 50; Cutler v. Wright, 22 N. Y. 472; Hull v. Augustine, 23 Wis. 383.

3, Crafts v. Clark, 3 Iowa 77; 38 Iowa 237; Cooper v. Reany, 4 Minn. 528; National Bank v. Lang, 2 N. Dak. 66; Thomas v. Beekman, 1 B. Mon. (Ky.) 29.

4, Ellis v. Maxson, 19 Mich. 186; 2 Am. Rep. 81.

5, Murphy v. Collins, 121 Mass. 6; Hill v. Wilker, 41 Ga. 449; Sayre v. Wheeler, 31 Iowa 112; 32 Iowa 559. Contra, Brimhall v. Van Campen, 8 Minn. 13; 82 Am. Lec. 118.

6, Ormes v. Dauchy, 82 N. Y. 443; 37 Am. Rep. 583 and note.

7, Hall v. Pillow, 31 Ark. 32; Juillard v. May, 130 Ill. 87; Hickman v. Alpaugh, 21 Cal. 225; Mortimer v. Marder, 93 Cal. 172; Evans v. Cleary, 125 Pa. St. 204; Rape v. Heaton, 9 Wis. 328; Osborn v. Blackburn, 78 Wis. 209; Haggin v. Haggin, 35 Neb. 375; Neese v. Insurance Co., 55 Iowa 604; Goodnow v. Litchfield, 67 Iowa 691. See also cases above cited.

8, *Newton v. Cocke*, 10 Ark. 169; *Murphy v. Collins*, 121 Mass. 6; *Ellis v. Maxson*, 19 Mich. 186; 2 Am. Rep. 81; *McCulloch v. Norwood*, 58 N. Y. 562; *Ufford v. Spaulding*, 156 Mass. 65; *Houghtaling v. Ball*, 19 Mo. 84; *Forbes v. Scannell*, 13 Cal. 242; *Carpenter v. Railway Co.*, 72 Me. 388; 39 Am. Rep. 340; *Bundy v. Hart*, 46 Mo. 460; *Kelly v. Kelly*, 161 Mass. 111; *Harris v. White*, 81 N. Y. 532; *Ormes v. Dauchy*, 82 N. Y. 443; 37 Am. Rep. 583 and note with illustrations. See 2 Am. Law Jour. 366, note 43; 1 Whart. Ev. secs. 314, 316.

9, *Monroe v. Douglas*, 5 N. Y. 447; *Savage v. O'Neil*, 44 N. Y. 298 and cases already cited.

§ 83. Same subject—Foreign law.—

The presumption has no application in respect to foreign countries having a system of jurisprudence of their own, which has no connection with our own or the common law, or to states which before becoming members of the Union were not subject to the common law.¹ Where the rights of litigants are to be determined in this country, although those rights might be affected by proof of the law of a *foreign* country where the contract was made or the right accrued, in the absence of any such proof the law of the forum must furnish the rule of decision;² so acts which are criminal by the law of the forum and are *malum in se* will be presumed to be crimes in a foreign state or country.³ Another qualification has been thus stated: Where a right is sought to be enforced in one state in relation to a subject matter existing in another state and no foreign law is proved and no common law rule was ever prescribed and

no contract exists, in such case the court will apply the law of the state in which it is sitting.⁴ Where a contract is made in one state or country to be performed in another, the presumption is that the parties contracted with reference to the laws of the latter.⁵

1, As to proof of foreign laws see secs. 514, 515, *infra*. There is no presumption that the common law prevails in Russia, *Savage v. O'Neil*, 44 N. Y. 298; or in Turkey, *Dainese v. Hale*, 91 U. S. 13; nor among the Cherokee Nation, *Du Val v. Marshall*, 30 Ark. 230. Nor is there a presumption in New York that by the law of New Granada a civil action lies for the negligent killing of another, *Whitford v. Panama Ry. Co.*, 23 N. Y. 465.

2, *McBride v. The Farmers Bank*, 26 N. Y. 450; *Forbes v. Scannell*, 13 Cal. 242; *Carpenter v. Grand Trunk Ry.*, 72 Me. 388; 39 Am. Rep. 340; *Lloyd v. Guibert*, L. R. 1 Q. B. 115. As to the rights of married women in Russia, see *Savage v. O'Neil*, 44 N. Y. 298.

3, *Cluff v. Mutual Benefit Life Ins. Co.*, 13 Allen 308.

4, *Crake v. Crake*, 18 Ind. 156, holding that in an action on a justice judgment rendered in another state it must be proved that the justice had jurisdiction of the subject matter since justices had no common law civil jurisdiction.

5, *Ormes v. Dauchy*, 82 N. Y. 443; 37 Am. Rep. 583 and cases cited.

§ 84. Contracts presumed to be legal.—
The presumption is never to be indulged that parties in making their contracts intended to violate the law; and if there are two laws with reference to which they may contract, and the contract accords with one of the laws, it must be presumed that the parties so intended because they had their election to

mould their contract according to either law, and as the law presumes in favor of a contract and not against it, the presumption must be that the parties had in view the law which will give full effect to their contract.¹ The law will not presume an agreement void as illegal or against public policy when it is capable of a construction which would make it consistent with the law and valid. The presumption of legality is stronger than that of the identity of laws.² But the qualification is sometimes added, that where a contract is declared void by the law of the state or country where it is made, it cannot be enforced as a valid contract in any other, though by its terms it was to have been performed there.³

1, *Brown v. Freeland*, 34 Miss. 181. As to the presumption of innocence see sec. 11 *et seq. supra*.

2, *Ormes v. Dauchy*, 82 N. Y. 443; 37 Am. Rep. 583; *Curtis v. Gokey*, 68 N. Y. 300; 1 Bish. Mar. & Div. sec. 412.

3, *Hyde v. Goodnow*, 3 Comst. (N. Y.) 266.

§ 85. Presumptions as to marriage.—

It is a familiar application of the general presumption in favor of the regularity of official and other lawful acts, that, when a marriage ceremony is shown to have been performed *de facto*, it is presumed to have been *properly and legally performed*.¹ Thus the consent of parents, when essential to the validity of a marriage, is presumed from the mere

record of the marriage.² So the publication of bans and the procuring of a license will be presumed from the proof of the solemnization of the marriage.³ When a marriage ceremony is shown, it will be presumed that the parties had legal capacity to marry; that the formalities of the law of the place were complied with, and that the marriage was a valid one.⁴ When persons live and cohabit together as husband and wife and are generally reputed to be husband and wife there is a presumption that they have been married.⁵ The courts look upon this presumption with great favor and it has been frequently held that a subsequent marriage might be presumed from these facts although the parties originally came together under a void contract.⁶ Mr. Bishop gives the following instances in which such proof has been deemed sufficient to raise the presumption of marriage: "Cohabitation and repute are adequate in questions of legitimacy."⁷ So even it was held where one sought to recover as heir of a deceased brother, during the life of the father, who was not called as a witness.⁸ And this evidence will suffice in a woman's action to have dower⁹ or to inherit property as widow of the deceased;¹⁰ in favor of husband and wife who jointly, as such, bring detinue,¹¹ or ejectment or any other ordinary civil action;¹² in a husband's suit for the slander of asserting that he is living in concubinage with the woman whom

he claims to be his wife;¹³ in an action against husband and wife for breach of the wife's promise, made before marriage, to marry the plaintiff;¹⁴ or to charge land held in the name of the wife, as the property of the husband,¹⁵ and also in settlement cases."¹⁶

1, *Piers v. Piers*, 2 H. L. Cas. 331; *Sichel v. Lambert*, 15 C. B. N. S. 781; *Harrod v. Harrod*, 1 Kay & J. 4; *R. v. Manwarring*, 26 Law J. M. C. 10; *R. v. Cradock*, 3 Fost. & F. 837. For full notes on the subject of this section see 57 Am. Rep. 451; 14 L. R. A. 540. As to proof of marriage in criminal cases see full note 36 Am. Dec. 745. As to legitimacy see sec. 92 *et seq. infra*; see also sec. 13 *supra*.

2, *Milford v. Worcester*, 7 Mass. 48. Contra, *Rex v. James*, Rus. & R. Cr. Cas. 17; *Rex v. Butler*, Rus. & R. Cr. Cas. 1; *Rex v. Morton*, Rus. & R. Cr. Cas. n. 19.

3, *Davis v. Davis*, 7 Daly (N. Y.) 308; *Murphy v. State*, 50 Ga. 150; *Saunders v. Saunders*, 10 Jur. 143; *Lloyd v. Passingham*, Coop. 152; 1 Bish. Mar. & Div. secs. 946, 947.

4, *Sichel v. Lambert*, 15 C. B. N. S. 781; 109 E. C. L. 781; *Catherwood v. Calson*, 1 Car. & M. 431; 41 E. C. L. 237; *United States v. DeAmador*, (N. M.) 27 Pac. Rep. 488; *United States v. DeLujan*, (N. M.) 27 Pac. Rep. 489; *United States v. Chavers*, (N. M.) 27 Pac. Rep. 489; *Meggison v. Megginson*, (Ore.) 14 L. R. A. 540 and full note; *Stew. Mar. & Div. secs. 124, 125*.

5, *Cargile v. Wood*, 63 Mo. 501; *Redgrave v. Redgrave*, 38 Md. 93; *Hynes v. McDermott*, 91 N. Y. 451; 43 Am. Rep. 677; *Morris v. Davies*, 5 Clark & F. 163; *Piers v. Piers*, 2 H. L. Cas. 331; *Young v. Foster*, 14 N. H. 114; *Fleming v. Fleming*, 8 Blackf. (Ind.) 234; *Stover v. Boswell*, 3 Dana (Ky.) 232; *Magginson v. Magginson*, 21 Ore. 387; *Applegate v. Applegate*, 45 N. J. Eq. 116; *Coal Run Coal Co. v. Jones*, 127 Ill. 379. As to what constitutes a valid *de facto* marriage, see 32 Cent. Law Jour. 321. See full note, 57 Am. Rep. 451-463, and see also note, 22 Am. Dec. 156.

6, *Betsinger v. Chapman*, 88 N. Y. 487, and cases cited; *Williams v. Kilburn*, 88 Mich. 279.

7, 1 Bish. Mar., Div. & Sep. sec. 943; *Clayton v. Wardell*, 5 Barb. 214; *Senser v. Bower*, 1 Pa. 450; *Eaton v. Bright*, 2 Lee 85; *Cheseldine v. Brewer*, 1 Har. & McH. (Md.) 152.

8, *Fleming v. Fleming*, 4 Bing. 266.

9, *Young v. Foster*, 14 N. H. 114; *Sellman v. Bowen*, 8 Gill & J. (Md.) 50; 29 Am. Dec. 524; *Stevens v. Reed*, 37 N. H. 49; *Pearson v. Howey*, 6 Halst. (N. J.) 12.

10, *Stover v. Boswell*, 3 Dana (Ky.) 232; *Kuhl v. Knauer*, 7 B. Mon. (Ky.) 130.

11, *Crozier v. Gano*, 1 Bibb (Ky.) 257.

12, *Hammick v. Bronzon*, 5 Day (Conn.) 290; *Boatman v. Curry*, 25 Mo. 433.

13, *Hobdy v. Jones*, 2 La. An. 944.

14, *Pettingill v. McGregor*, 12 N. H. 179.

15, *Jenkins v. Bisbee*, 1 Edw. Ch. (N. Y.) 377.

16, *Rex v. Stockland*, 1 W. Black. 367.

§ 86. **Cohabitation and reputation to concur — Weight of presumption.**— Both cohabitation and repute should concur in order to raise the presumption of marriage; mere cohabitation is not sufficient,¹ nor is mere repute.² This repute must be of a general and not of a special character.³ Says Mr. Bishop: "These elements of proof — namely, cohabitation, reputation, declarations, conduct and reception among friends and neighbors as married — are commonly, in a perfect case, found in combination. All the latter ones are shadows attending on cohabitation,

and they should be simultaneous therewith. Together they make a complete case; while in legal doctrine there is no necessity of exhibiting all the shadows in connection with that from which they fall, cohabitation."⁴ Where the presumption of marriage has been created by proof of cohabitation and repute, it is not to be lightly repelled; on the contrary it is a presumption of great weight, and can only be overcome by clear and satisfactory proof. *Semper praesumitur pro matrimonio*. This is especially true in a case involving legitimacy. The law presumes morality and not immorality, marriage and not concubinage, legitimacy and not bastardy. Where there is enough to create a foundation for the presumption of marriage, it can be repelled only by the most cogent and satisfactory evidence.⁵ The strength of the presumption increases with the lapse of time during which the cohabitation and reputation of marriage continue.⁶

1, Com. v. Stump, 53 Pa. St. 132; 91 Am. Dec. 198; Cargile v. Wood, 63 Mo. 501; Foster v. Hawley, 8 Hun 68.

2, Greenawalt v. McEnelly, 85 Pa. St. 352; Blair v. Howell, 68 Iowa 619. But see 1 Bish. Mar. & Div. sec. 936; Badger v. Badger, 88 N. Y. 546; 42 Am. Rep. 263; Richard v. Brehm, 73 Pa. St. 140; 13 Am. Rep. 733.

3, Cunningham v. Cunningham, 2 Dow 482; Barnum v. Barnum, 42 Md. 251; Jones v. Hunter, 2 La. An. 254.

4, 1 Bish. Mar. & Div. sec. 939; Westfield v. Warren, 3 Halst. (N. J.) 249; Stevenson v. McKeary, 12 Smedes & M. (Miss.) 956; 51 Am. Dec. 102; Com. v. Hurley, 14 Gray

411; Vincent's Appeal, 60 Pa. St. 228; Jones v. Reddick, 79 N. C. 290.

5, Hynes v. McDermott, 91 N. Y. 451; 43 Am. Rep. 677; Piers v. Piers, 2 H. L. Cas. 331. This is especially true in cases involving questions of legitimacy, Morris v. Davies, 5 Clark & F. 163. On the general subject see article, 31 Alb. Law Jour. 106, 127; also extended note, 57 Am. Rep. 451.

6, Teter v. Teter, 101 Ind. 129; 51 Am. Rep. 742; Caujolle v. Ferrie, 26 Barb. 177; Wilkie v. Collins, 48 Miss. 496; Steadman v. Powell, 1 Add. Ec. 58; Legeyt v. O'Brien, Milw. 325; Else v. Else, Milw. 146; Smith v. Huston, 1 Phillm. 287.

§ 87. Presumption of marriage in civil and criminal issues.—In an early case it was held that, in an action for criminal conversation, proof of cohabitation and repute alone could not raise a presumption of marriage;¹ but by the weight of authority the presumption of marriage may be created by proof of cohabitation and by repute, where the action is for divorce on the ground of adultery.² For obvious reasons a stricter rule obtains when the fact of marriage is in issue in a *criminal case*. Accordingly we find a long line of cases holding that when in a criminal case the result of proof of marriage would show the defendant to be guilty of bigamy, polygamy, adultery, incest, lascivious cohabitation or other crime there must be direct proof of actual marriage.³ These cases proceed upon the theory that the presumption of marriage arising from mere evidence of cohabitation and repute is counter-

balanced by the presumption of innocence.⁴ On the other hand there are cases which proceed upon the theory that one who cohabits with another and appears to the world to live in the marriage relation substantially admits or confesses that such relation exists, and hence that such cohabitation and reputation and the conduct of the defendant in introducing another as husband or wife may be shown even in a criminal case.⁵ It seems to be generally conceded that the *confessions* of the defendant deliberately made afford proof of marriage in criminal cases.⁶ The rule seems to have been declared by the greater number of decisions that in criminal cases there must be direct proof of the marriage and that proof afforded by the cohabitation, reputation and the conduct of the defendant are not sufficient. But there is much reason and high authority for the view that the jury may find proof of marriage by other testimony than that of witnesses present at the ceremony; and that they may even in criminal cases determine whether cohabitation and reputation and the acts and statements of the accused under all the circumstances of the case constitute satisfactory proof.⁷

1, *Morris v. Miller*, 4 Burr. 2057; 1 W. Black. 632. This case has been constantly cited as authority, see Mr. Bishop's comments on its history, 1 Bish. Mar. & Div. secs. 1036 and 1042. For full note on the general subject, see 57 Am. Rep. 451.

2, *Morris v. Morris*, 20 Ala. 168; *Wright v. Wright*, 6

Tex. 3; Trimble v. Trimble, 2 Ind. 76. But in Collins v. Collins, 80 N. Y. 1, the court held such evidence insufficient where the plaintiff did not testify that any marriage had taken place. Action for divorce on ground of desertion, Purcell v. Purcell, 4 Hen. & M. (Va.) 507; on the ground of cruelty, Harman v. Harman, 16 Ill. 85; Burns v. Burns, 13 Fla. 369.

3, Cases for criminal conversation, Morris v. Miller, 1 W. Black. 632; Birt v. Barlow, 1 Doug. 171; Catherwood v. Caston, 13 M. & W. 261; for bigamy or polygamy, Case v. Case, 17 Cal. 298; People v. Humphrey, 7 Johns 314; Clayton v. Wardell, 4 N. Y. 230; for adultery, Com. v. Norcross, 9 Mass. 492; State v. Hodgkins, 19 Me. 155; 36 Am. Dec. 742 and full note; for incest, State v. Roswell, 6 Conn. 446; for lascivious cohabitation, Hopper v. State, 19 Ark. 143; Com. v. Littlejohn, 15 Mass. 163. See article, 31 Alb. Law Jour. 106, 127.

4, Clayton v. Wardell, 4 N. Y. 230.

5, Com. v. Jackson, 11 Bush (Ky.) 679; 21 Am. Rep. 225; Cook v. State, 11 Ga. 53; State v. Hughes, 35 Kan. 626, 57 Am. Rep. 195; State v. Britton, 4 Mc Cord (S. C.) 256; Oneale v. Com., 17 Gratt. (Va.) 582; Williams v. State, 44 Ala. 24.

6, State v. Hughes, 35 Kan. 626; 57 Am. Rep. 195; Dumas v. State, 14 Tex. App. 464; 46 Am. Rep. 241; Miles v. United States, 103 U. S. 304; State v. Hilton, 3 Rich. (S. C.) 434; Cameron v. State, 14 Ala. 546; Wolverton v. State, 16 Ohio 173; Forney v. Hallacher, 8 Serg. & R. (Pa.) 159; Jackson v. People, 2 Scam. (Ill.) 231.

7, Miles v. United States, 103 U. S. 304; Langtry v. State, 30 Ala. 536; Finney v. State, 3 Head (Tenn.) 544; Ham's Case, 11 Me. 391; Squire v. State, 46 Ind. 459; Reg. v. Simmonsto, 1 Car. & K. 164; 47 E. C. L. 164; Halbhook v. State, 34 Ark. 511; 36 Am. Rep. 17 and note; Com. v. Jackson, 11 Bush (Ky.) 679; 21 Am. Rep. 225; George v. Thomas, 10 U. C. Q. B. 604; 2 Greenl. Ev. sec. 461; 1 Whart. Ev. sec. 85 *et seq.*

§ 88: No presumption arising from illicit cohabitation.—Since this presumption of marriage from cohabitation and repute rests

on the principle that the law presumes morality and innocence rather than crime, the presumption does not arise, if it follows logically as a result of such presumption that one of the parties has committed another equal or greater offense. For example, if it be shown that during the cohabitation one of the parties was cohabiting with another person, no presumption of marriage arises in either case;¹ and where the relation between a man and a woman living together is *illicit* in its commencement, it is presumed so to continue until a change is shown by evidence, showing the desire of the parties to live in marriage and not in illicit intercourse.² But the presumption of the continuance of the illicit intercourse may of course be overcome by evidence showing that the character of the original connection has ceased. The fact that the relation was at first unlawful does not prevent the parties from entering into the contract of marriage when the impediment no longer exists and, in the absence of statute, the contract may arise from mere private agreement on the part of the parties.³ Although there must be an agreement to marry, changing the illicit connection to a lawful one, it is not necessary to prove any *formal ceremony*; and the evidence showing the new agreement may be circumstantial in its character.⁴ While the evidence need not show the exact time or place or the circumstances under which the

unlawful connection was changed to a lawful one,⁵ yet the circumstances should be such as to exclude the inference that the meretricious connection still continues.⁶ And yet the courts should look with favor upon any facts or circumstances which tend to show that the union has become lawful. In numerous cases, the courts in their desire to follow the maxim, *semper praesumitur pro matrimonio*, have sustained the finding of juries in favor of marriage although the probabilities were very strong that no new agreement had actually taken place.⁷ On the other hand there is another class of decisions which apply a somewhat stricter rule; which seem to lean toward the view that the continued connection will be referred to the commencement of the unlawful union between the parties, unless there is clear evidence showing the intention to change the nature of such union. Following the same tendency these decisions require more direct or formal proof that a marriage has taken place.⁸ Where the cohabitation has been illicit by reason of one of the parties having a husband or wife living and where the cohabitation continues after the death of such husband or wife, it is generally for the jury to determine under proper instructions from the court whether a lawful marriage may be inferred.⁹ In determining the question it is relevant to show that the original union, though unlawful, was in *good faith*; on the contrary the

knowledge or want of knowledge of the parties that the impediment to marriage had been removed and the desire of the parties to live in lawful matrimony or the reverse; all these and other facts may have a material bearing in determining whether the parties have agreed to change the illicit connection into legal marriage or whether continued cohabitation is to be referred to its unlawful inception.¹⁰ Of course on such inquiry the circumstance that the parties represented themselves to be husband and wife, when they knew they were not, may be reasonably taken into account in estimating their subsequent conduct.¹¹

1, *Chamberlain v. Chamberlain*, 71 N. Y. 423; *Jones v. Jones*, 48 Md. 391; 30 Am. Rep. 466; *Houpt v. Houpt*, 5 Ohio 539; *Stevens v. Joyal*, 48 Vt. 291; *Hill v. State*, 41 Ga. 484; *Williams v. State*, 44 Ala. 24; *Harrison v. Lincoln*, 48 Me. 205; *Breakley v. Breakley*, 2 U. C. Q. B. 349; *Blanchard v. Lambert*, 43 Iowa 228.

2, *Appeal of Reading Trust Co.*, 113 Pa. St. 204; 57 Am. Rep. 448; *Badger v. Badger*, 88 N. Y. 546; 42 Am. Rep. 263; *Brinkley v. Brinkley*, 50 N. Y. 184; 10 Am. Rep. 460; *Floyd v. Calvert*, 53 Miss. 37; *Jones v. Jones*, 45 Md. 144; *State v. Worthingham*, 23 Minn. 528; *Hunt's Appeal*, 86 Pa. St. 294; *Rose v. Rose*, 67 Mich. 619; *Williams v. Williams*, 46 Wis. 464; 32 Am. Rep. 722, see note to this case by J. R. Berryman in 18 Law Reg. N. S. 639. See article, 31 Alb. Law Jour. 106, 127. See also note, 57 Am. Rep. 451-463.

3, *De Thoren v. Attorney General*, 1 App. Cas. 686; 17 Eng. Rep. 72; *Nathan's Case*, 2 Brewst. (Pa.) 149; *Dyer v. Brannock*, 66 Mo. 391; *Collins v. Voorhees*, 47 N. J. Eq. 555.

4, *Foster v. Hawley*, 8 Hun 68; *Hynes v. McDermott*, 91 N. Y. 451; 43 Am. Rep. 677; *Donelly v. Donelly*, 8 B. Mon. (Ky.) 113.

5, *Badger v. Badger*, 88 N. Y. 546; 42 Am. Rep. 263; *Caujolle v. Ferrie*, 23 N. Y. 90; *Hyde v. Hyde*, 3 Bradf. Surr. (N. Y.) 509; *Queen v. Millis*, 10 Clark & F. 749.

6, *Williams v. Williams*, 46 Wis. 464; 32 Am. Rep. 722; *Lapsley v. Grierson*, 1 H. L. Cas. 498; *Foster v. Hawley*, 8 Hun 68.

7, *Fenton v. Reed*, 4 Johns. 52; *Donelly v. Donelly*, 8 B. Mon. (Ky.) 113; *Wilkinson v. Paine*, 4 T. R. 468; *Piers v. Piers*, 2 H. L. Cas. 331; *Yates v. Houston*, 3 Tex. 433; *Hynes v. McDermott*, 91 N. Y. 451; 43 Am. Rep. 677.

8, *Appeal of Reading Trust Co.*, 113 Pa. St. 204; 57 Am. Rep. 448; *Williams v. Williams*, 46 Wis. 464; 32 Am. Rep. 722; *Cartwright v. McGown*, 121 Ill. 388; 2 Am. St. Rep. 105; *Voorhees v. Voorhees*, 46 N. J. Eq. 411; 19 Am. St. Rep. 405.

9, *State v. Worthingham*, 23 Minn. 528; *Hynes v. McDermott*, 91 N. Y. 451; 43 Am. Rep. 677; *Lapsley v. Grierson*, 1 H. L. Cas. 498; 1 Bish. Mar. & Div. sec. 985. This is especially true if there is any evidence tending to show a change from the unlawful union.

10, This is illustrated in most of the cases cited in this section. See also *Jackson v. Jackson*, 94 Cal. 446.

11, *Campbell v. Campbell*, L. R. 1 H. L. Sc. App. 182.

§ 89. Other presumptions growing out of marriage relation.—There are other presumptions growing out of the relation of husband and wife. Thus if a husband, temporarily absent from home, leaves his wife in possession of his property and appoints no one else as his *agent*, it will be presumed that he expects her to act as his agent in respect to its care and protection;¹ so it is presumed when they are living together that the husband is the *head of the family*;² and that the wife has the authority to bind the

husband for necessaries.³ The simple fact that they are living together is deemed sufficient to raise the presumption as to ordinary purchases, that the wife is rightfully making such purchases of *necessaries* as she may think proper;⁴ but where it is shown that the wife lives apart from the husband at the time of making the contract, it is the presumption that she is not authorized by him to purchase necessaries on his credit.⁵ The presumption of the wife's authority to obtain credit for necessaries may be rebutted, for example, by proof that the purchases were not made on the credit of the husband, but on that of the wife's separate estate, or on the credit of a third person,⁶ or by proof that the husband had notified the tradesman in advance not to give credit, in cases where he himself is not delinquent.⁷ So when the husband uses as his own the property of the wife with her consent and acquiescence, a gift from her will be presumed.⁸

1, 1 Bish. Mar. & Div. secs. 1206-1209 and cases; Stew. Mar. & Div. sec. 174.

2, Clinton v. Kidwell, 82 Ill. 427.

3, Pickering v. Pickering, 6 N. H. 120; Stall v. Meek, 70 Pa. St. 131; Bergh v. Warner, 47 Minn. 250; 28 Am. St. Rep. 362; Baker v. Carter, 83 Me. 132; 23 Am. St. Rep. 764; McGrath v. Donnelly, 121 Pa. St. 549; 1 Bish. Mar. & Div. sec. 1197.

4, 1 Bish. Mar. & Div. sec. 1197; Montague v. Benedict, 3 Barn. & C. 631; Freestone v. Butcher, 9 Car. & P. 643; Emmett v. Norton, 8 Car. & P. 506; Jewsbury v. Newbold

40 E. L. & Eq. 518; *Phillipson v. Hayter*, L. R. 6 C. P. 38. See also *Debenham v. Mellon*, L. R. 5 Q. B. 394.

5, *Johnston v. Sumner*, 3 Hurl. & N. 261; *Walker v. Simpson*, 7 Watts & Serg. (Pa.) 83; *Mitchell v. Treanor*, 11 Ga. 324; 56 Am. Dec. 421; *Rea v. Durkee*, 25 Ill. 503; *Stutevant v. Starin*, 19 Wis. 268; *Schoul. Dom. Rel. secs.* 69, 70; 1 Bish. Mar. & Div. sec. 1250.

6, *Pearce v. Darrington*, 32 Ala. 227; *Stammers v. Maccomb*, 2 Wend. 454; *Moses v. Fogartie*, 2 Hill (S. C.) 335; *Carter v. Howard*, 39 Vt. 106; *Swett v. Penrice*, 24 Miss. 416; *Simmons v. McElwain*, 26 Barb. 419; *Weisker v. Lowenthal*, 31 Md. 413; *Holt v. Brien*, 4 Barn. & Ald. 252; *McMahon v. Lewis*, 4 Bush (Ky.) 138.

7, 1 Bish. Mar. & Div. sec. 1196.

8, *Courtwright v. Courtwright*, 53 Iowa 57; *Hamilton v. Lightner*, 53 Iowa 470; *Sabel v. Slingluff*, 52 Md. 132; *Jacobs v. Hesler*, 113 Mass. 157; *Reeder v. Flinn*, 6 Rich. (S. C.) 216; *Lishey v. Lishey*, 2 Tenn. Ch. 5.

§ 90. **Same — Of coercion by the husband.**— Perhaps the most important of these presumptions is the familiar rule of the criminal law that acts of a criminal nature committed by the wife in the presence of her husband are presumed to be compelled by him.¹ Though the foregoing is the general rule sanctioned by abundant authority, it does not apply in cases of treason or murder;² and it has been doubted whether it applies in cases of highway robbery,³ felonious wounding⁴ and the keeping of bawdy houses.⁵ The general rule has been applied in a great variety of offenses; for example, uttering counterfeit money,⁶ burglary and receiving stolen goods,⁷ larceny,⁸ selling intoxicating liquors,⁹

nuisance¹⁰ and assault and battery.¹¹ The same principle applies in civil actions growing out of torts by the wife in the presence of her husband. The presence of the husband raises the presumption that the wrong was the result of his command.¹² "The authorities are clear that, when a tort or felony of an inferior degree is committed by the wife in the presence and by the direction of the husband, she is not personally liable. To exempt her from liability both of these concurrent circumstances must exist, to wit, the presence and the command of the husband. An offense by his direction, but not in his presence, does not exempt her from liability, nor does his presence, if unaccompanied by his direction." ¹³

1, See discussions and notes on this subject, 1 Bish. Cr. L. secs. 356-366; *Rex v. Price*, 8 Car. & P. 19; *Davis v. State*, 15 Ohio 72; 45 Am. Dec. 559; *State v. Nelson*, 29 Me. 329; *Com. v. Trimmer*, 1 Mass. 476; *State v. Williams*, 65 N. C. 398; *Com. v. Neal*, 10 Mass. 152; 6 Am. Dec. 105 and long note; *Story v. Downey*, 62 Vt. 243. For illustrations of the extent to which the rule was formerly carried, see notes to *Rex v. Knight*, 1 Car. & P. 116.

2, 1 Bish. Cr. L. secs. 358, 361; *Miller v. State*, 25 Wis. 384.

3, *Rex v. Stapleton*, 1 Craw. & D. 163; *People v. Wright*, 38 Mich. 744; *Rex v. Torpey*, 12 Cox Cr. C. 45; *Bibb v. State*, 94 Ala. 31.

4, *Rex v. Smith*, 8 Cox Cr. C. 27.

5, 1, Bish. Cr. L. sec. 361; *Rex v. Dixon*, 10 Mod. 335; *Reg. v. Williams*, 1 Salk. 384; *State v. Bentz*, 11 Mo. 27.

- 6, *Rex v. Connolly*, 2 Lew. Cr. C. 229.
- 7, *Rex v. Archer*, 1 Moody Cr. C. 143.
- 8, *Rex v. Knight*, 1 Car. & P. 116.
- 9, *Com. v. Burk*, 11 Gray 437.
- 10, *People v. Townsend*, 3 Hill 479.
- 11, *State v. Williams*, 65 N. C. 398; *Com. v. Neal*, 10 Mass. 152; 6 Am. Dec. 106 and long note.
- 12, *Cassin v. Delaney*, 38 N. Y. 178, malicious prosecution; *Brazil v. Moran*, 8 Minn. 236; 83 Am. Dec. 772 and note, assault and battery; *McKeown v. Johnson*, 1 McCord (S. C.) 578; 10 Am. Dec. 698, trespass.
- 13, *Cassin v. Delaney*, 38 N. Y. 178.

§ 91. **Same subject—Nature and limits of the presumption.**—Although the presumption does not arise unless the tortious or criminal act is performed in the presence of the husband, it is not necessary that he should be *literally present*; thus if he is momentarily out of the room or otherwise out of her immediate presence, but under such circumstances that his influence over her may be supposed to continue, the presumption may still arise.¹ Some of the cases have carried the doctrine far beyond the bounds of reason and have applied the presumption to shield the wife when she had actually engaged in crime in the *absence* of her husband, or under such circumstances that the idea of coercion or fear seemed absurd.² The rule came to prevail at common law at a time when the husband was the undoubted autocrat over the property and person of the wife. But the

husband no longer has any such legal supremacy and there is every reason for applying somewhat more cautiously this presumption which in a different state of the law was highly favored. The presumption was never conclusive; and the modern decisions have proceeded on the theory that it may be easily rebutted. It will be seen by referring to the decisions cited that the circumstances of the case may, without independent evidence, *rebut the inference* of coercion; or it may be shown that the wife was the instigator or more active party, or that the husband although present was incapable of coercion, or that the wife was the stronger of the two.³ It is error to exclude the testimony of the husband that the wife acted of her own motion and without coercion.⁴

1, *Com. v. Burk*, 11 Gray 437; *Com. v. Munsey*, 112 Mass. 287.

2, *Rex v. Knight*, 1 Car. & P. 116 and cases cited in the note to this case.

3, *Marshall v. Oakes*, 51 Me. 308; *Wagener v. Bill*, 19 Barb. 321; *Brazil v. Moran*, 8 Minn. 236; 83 Am. Dec. 772 and note; *City Council v. Van Roven*, 2 McCord (S. C.) 465; *Ferguson v. Brooks*, 67 Me. 251; *Franklin's Appeal*, 115 Pa. St. 534; 2 Am. St. Rep. 583.

4, *Cassin v. Delaney*, 38 N. Y. 178; *Brazil v. Moran*, 8 Minn. 236; 83 Am. Dec. 772 and note.

§ 92. Presumption of legitimacy.—The law presumes that every child is legitimate.¹ In his work on evidence Mr. Stephen thus states the modern English rule as to the presumption in favor of legitimacy: "The

fact that any person was born during the continuance of a valid marriage between his mother and any man, or within such a time after the dissolution thereof and before the celebration of another valid marriage, that his mother's husband could have been his father, is conclusive proof that he is the legitimate child of his mother's husband, unless it can be shown, either that his mother and her husband had no access to each other at any time when he could have been begotten, regard being had both to the date of the birth and to the physical condition of the husband or that the circumstances of their access (if any) were such as to render it highly improbable that sexual intercourse took place between them when it occurred."² This presumption is the application of a particular branch of the broader presumption in favor of innocence. *Odiosa et honesta non sunt in lege praesumenda*. At one time if it appeared that the husband was within the four seas at any time during the pregnancy of the wife, the presumption in favor of legitimacy *was conclusive*.³ This absurd rule could not long endure even in a system of jurisprudence which abounded in legal fictions and after various attempted exceptions and classifications, all of which were illogical and unsatisfactory, the rule came to prevail in England substantially as stated by Mr. Stephen, leaving the question of legitimacy

to be determined by the court or jury on the evidence presented as to the access or non-access of the husband.⁴ Wherever the child is born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, sexual intercourse is presumed to have taken place between the husband and the wife, until the presumption is encountered by such evidence as proves to the satisfaction of those who are to decide the question that such intercourse did not take place at any time, when by such intercourse the husband could be the father of the child.⁵ To bastardize a child born in lawful wedlock, the most *clear and conclusive evidence* of non-access is required.⁶ It is a familiar rule that issue born in wedlock, though begotten before, is presumptively legitimate.⁷

1, *Strode v. McGowan*, 2 Bush (Ky.) 621; *Gaines v. New Orleans*, 6 Wall. 642; *Gaines v. Herman*, 24 How. 553. On the general subject of this section see note, 56 Am. Dec. 206; also article by J. D. Lawson, 18 Cent. L. J. 262.

2, Steph. Ev. art. 98.

3, *Rex v. Alberton*, 1 Ld. Raym. 395; *Reg. v. Murray*, 1 Salk. 122. But see, *King v. Luffe*, 8 East 193.

4, 2 Kent Com. 211. For cases illustrating the various stages of the doctrine on this subject, see *Rex v. Murray*, 1 Salk. 122; *Rex v. Alberton*, 1 Ld. Raym. 395; *King v. Luffe*, 8 East 193; *Pendrell v. Pendrell*, 2 Str. 925; *Hargrave v. Hargrave*, 9 Beav. 552; *Head v. Head*, 1 Sim. & St. 150; *Plower v. Bossey*, 2 Drew. & S. 145; 31 L. J. Ch. 681; *Atchley v. Sprigg*, 33 L. J. Ch. 345. As to presumption of marriage, see sec. 85 *supra*.

5, *Banbury v. Peerage*, 1 Sim. & St. 153.

6, Steph. Ev. art. 98; *Hynes v. McDermott*, 91 N. Y. 451; 43 Am. Rep. 677; *Watts v. Owens*, 62 Wis. 512; *In re Robbs estate*, 37 S. C. 19; *Scott v. Hillenberg*, 85 Va. 245.

7, *Miller v. Anderson*, 43 Ohio St. 473; *Tioga Co. v. South Creek*, 75 Pa. St. 433; *State v. Harman*, 13 Ired. (N. C.) 502; *State v. Romaine*, 58 Iowa 46.

§ 93. **Same — How rebutted.**—There has been much controversy on the point whether, in order to rebut the presumption, the proof should show that it is impossible or merely improbable that the husband should be the father of the child. But the rule seems now well established in England and in this country that the non-access need not be shown beyond any possible doubt, but the presumption of legitimacy is so highly favored that the *proof of non-access should be clear and satisfactory*.¹ And when access, that is an opportunity for sexual intercourse is shown, the presumption of legitimacy is very strong indeed,² though not conclusive; it still being a question for trial whether such intercourse has actually taken place.³ Thus it is open to proof, notwithstanding the strong probabilities to the contrary, that there was not in fact sexual intercourse, although the parties may have lived in the same house. If notwithstanding such fact the evidence is satisfactory that no such intercourse took place, the presumption may be thus rebutted.⁴ The presumption arises *though the parties live apart*

by mutual consent, though not when they are separated by the *divorce* of the court. They are then presumed to obey the judgment of the court.⁵

1, *Wright v. Hicks*, 15 Ga. 160; 60 Am. Dec. 687; *Hargrave v. Hargrave*, 9 Beav. 552. Some of the cases hold that the proof should be beyond a reasonable doubt, *Watts v. Owens*, 62 Wis. 512; *Phillips v. Allen*, 2 Allen 453; *Plowes v. Bossey*, 31 L. J. Ch. 681; *Atchley v. Sprigg*, 33 L. J. Ch. 345; *Van Aernam v. Van Aernam*, 1 Barb. Ch. (N. Y.) 375; *Sullivan v. Kelly*, 3 Allen 148.

2, *Plowes v. Bossey*, 31 L. J. Ch. 681; *Wright v. Hicks*, 15 Ga. 160; 60 Am. Dec. 687; *Morris v. Davies*, 5 Clark & F. 163; *Cope v. Cope*, 5 Car. & P. 604; *Bury v. Phillpot*, 2 Mylne & K. 349; *Van Aernam v. Van Aernam*, 1 Barb. Ch. (N. Y.) 375.

3, *Reg. v. Inhabitants of Mansfield*, 1 Q. B. 444; *Cope v. Cope*, 5 Car. & P. 604; *Com. v. Shepherd*, 6 Binn. (Pa.) 283; 6 Am. Dec. 449; *Wright v. Hicks*, 15 Ga. 160; 60 Am. Dec. 687; *Phillips v. Allen*, 2 Allen 453; *Dennison v. Page*, 29 Pa. St. 420; 72 Am. Dec. 644. Proof that husband and wife slept together is said to afford an irresistible inference of sexual intercourse, *Legge v. Edmonds*, 25 L. J. Ch. 125. So where they lodge in the same house having frequent opportunity for sexual intercourse, *Shuman v. Shuman*, 83 Wis. 250. The following language illustrates the strength of the presumption where access is shown: "If it were proved that the wife slept every night with her paramour from the period of her separation from her husband, I must still declare the children to be legitimate." Sir John Leach in *Bury v. Phillpot*, 2 Mylne & K. 349.

4, *Wright v. Hicks*, 15 Ga. 160; 60 Am. Dec. 687; *State v. Pettaway*, 3 Hawks (N. C.) 623; *Rex v. Inhabitants of Mansfield*, 1 Q. B. 444; *Cope v. Cope*, 5 Car. & P. 604; *Com. v. Shepherd*, 6 Binn. (Pa.) 283; 6 Am. Dec. 449. Compare *Shuman v. Shuman*, 83 Wis. 250.

5, *St. George v. St. Margaret*, 1 Salk. 123; *Sidney v. Sidney*, 3 Will. (P.) 275; *Hemmenway v. Towner*, 1 Allen 209.

§ 94. Same — Conclusive if sexual intercourse between husband and wife is shown.—If such sexual intercourse is shown between the husband and wife at a time, when by the laws of nature the husband might be the father of the child, the presumption is conclusive in favor of legitimacy. Even though the wife at the time might have been living in adultery with another, her sexual intercourse with others can not under such circumstances be given in evidence.¹ The only evidence which can in such a case rebut the presumption is that of the impotency of the husband.² The burden of proof of such fact is upon the one asserting it.³

1, *Morris v. Davies*, 5 Clark & F. 163; *Cope v. Cope*, 5 Car. & P. 604; *Hemmenway v. Towner*, 1 Allen 209; *Cross v. Cross*, 3 Paige Ch. (N. Y.) 139; 23 Am. Dec. 778. See *Cannon v. Cannon*, 7 Humph. (Tenn.) 410, an exceptional case holding contrary view; and see also *Hening v. Goodson*, 43 Miss. 392. Proof may be given that the husband was impotent or absent when the conception took place, 1 Bish. Mar. & Div. sec. 1182. Proof may also be given that it is contrary to the laws of nature that both parents of a mulatto should be white, *Bullock v. Knox*, 96 Ala. 195. See also *Illinois Loan Co. v. Bonner*, 75 Ill. 315.

2, *Com. v. Shepherd*, 6 Binn. (Pa.) 283; 6 Am. Dec. 449; *Legg v. Edmonds*, 25 L. J. Ch. 125.

3, *State v. Broadway*, 69 N. C. 411; *Gardner v. State*, 81 Ga. 144.

§ 95. Same — Relevant facts when sexual intercourse between husband and wife is not shown.—Where sexual intercourse between the husband and wife is

not shown, many circumstances may be relevant to rebut the presumption that the child born in wedlock is legitimate; for example, the conduct of the supposed father and of the mother toward the child;¹ the relative situation of the parties and their habits of life and reputation in the family;² the adultery of the mother or other facts bearing on the probabilities of the case.³ So it is relevant on the issue to show that the wife had concealed the birth of the child from her former husband and that the husband had acted as if no such child had been born.⁴ Under the rule already stated, it would of course be sufficient to establish the illegitimacy to prove that the wife was living in adultery when the child was begotten, and that the husband was residing at such a place that access was impossible.⁵

1, *Morris v. Davies*, 5 Clark & F. 163.

2. *Wright v. Hicks*, 15 Ga., 160; 60 Am. Dec. 687; *Stegall v. Segall*, 2 Brock. (U. S.) 256; *Weatherford v. Weatherford*, 20 Ala. 548; 56 Am. Dec. 206 and long note.

3, *Cope v. Cope*, 5 Car. & P. 604; *Wright v. Hicks*, 15 Ga. 160; 60 Am. Dec. 687.

4, *Morris v. Davies*, 5 Clark & F. 163. There are cases which have adopted a practice of doubtful propriety, that of admitting evidence that the child bore a resemblance to the husband or the contrary, *Warlick v. White*, 76 N. C. 175; *State v. Bowles*, 7 Jones (N. C.) 579; *State v. Britt*, 78 N. C. 439. Contra, *Jones v. Jones*, 45 Md. 144; *Clark v. Bradstreet*, 80 Me. 454; 6 Am. St. Rep. 221; *People v. Parney*, 29 Hun 47. See also *Ill. Land Co. v. Bonner*, 75 Ill. 315.

5, *The Barony of Saye v. Sele*, 1 H. L. Cas. 507; *Gurney v. Gurney*, 32 L. J. Ch. 456.

§ 96. **The husband or wife not allowed to deny sexual intercourse.**—It is well settled on grounds of public policy, affecting the children born during the marriage, as well as the parties themselves, that the presumption of legitimacy as to children born in lawful wedlock cannot be rebutted by the testimony of the husband or the wife to the effect that sexual intercourse has or has not taken place between them;¹ nor are the *declarations* of such husband or wife competent as bearing on the question.² The rule not only excludes direct testimony concerning such intercourse, but all testimony of such husband or wife which has a tendency to prove or disprove legitimacy; for example, it was held incompetent to ask the husband, for the purpose of proving non-access, whether at a given time he did not live a hundred miles away from his wife and whether at that time he was not cohabiting with another person.³ Testimony of either party even *tending to show non-intercourse*, or of any fact from which non-access may be inferred, or of any collateral facts connected with the main fact, should be scrupulously excluded, and if the illegitimacy is to be proved, it must be proved by other testimony.⁴ The rule rests not only on the ground that it tends to prevent family dissension, but on broad grounds of *public policy*; hence it applies when at the time of the examination of the husband or

wife the other spouse is dead.⁵ Nor is the rule affected by the provisions of the codes enlarging the competency of witnesses;⁶ nor does it depend upon the form of action or the parties; on the contrary it obtains *whatever the form of legal proceedings*, or whoever may be the parties.⁷ But the rule does not prevent one acknowledged or proved to be the parent of a child, whose legitimacy is in question, from testifying that he or she was *not married* before the birth of the child.⁸ While the rule prevents the wife from testifying that she has not had intercourse with her husband, it does not prevent the wife from testifying that another person than her husband has had or has not had connection with her.⁹

1, Goodright v. Moss, 2 Cowp. 591; Abington v. Duxbury, 105 Mass. 287; Shuman v. Shuman, 83 Wis. 250; Scanlan v. Walshe, (Md.) 31 At. Rep. 498; Steph. Ev. art. 98, and cases cited below.

2, Steph. Ev. art. 98.

3, Rex v. Sourton, 5 Adol. & Ell. 180; Dennison v. Page, 29 Pa. St. 420; 72 Am. Dec. 644; People v. Overseers, 15 Barb. 286; Com. v. Shepherd, 6 Binn. (Pa.) 283; 6 Am. Dec. 449; State v. Pettaway, 3 Hawks (Tenn.) 623; Cope v. Cope, 5 Car. & P. 604.

4, Mink v. State, 60 Wis. 583; Shuman v. Shuman, 83 Wis. 250; Clapp v. Clapp, 97 Mass. 531, an action for divorce, adultery charged.

5, Rex v. Kea, 11 East 132.

6, Chamberlain v. People, 23 N. Y. 85; 80 Am. Dec. 255.

7, Chamberlain v. People, 23 N. Y. 85; 80 Am. Dec. 255.

8, *Haddock v. Boston & Maine Ry. Co.*, 3 Allen 298; 81 Am. Dec. 656.

9, *Rex v. Luffe*, 8 East 193; *Rex v. Rook*, 1 Wils. 340. This is often illustrated in bastardy proceedings.

§ 97. Presumptions as to infants — Capacity to commit crime — Consent to sexual intercourse and marriage.— Among other presumptions are those growing out of the law regulating the rights and liabilities of infants. Perhaps there is no better illustration of a conclusive presumption of law than the well known rule of the common law that an *infant under seven years of age* is presumed to be *incapable of committing a crime*. This rule applies now as at common law to felonies and misdemeanors alike.¹ At common law it was also a conclusive presumption that *males under fourteen years of age* could not commit *rape*; and no evidence was allowed to prove that a defendant under fourteen years of age was capable of committing the crime.² But in the United States this offence is treated in this respect like other crimes.³ Persons *over seven and under fourteen years* are presumed incapable of committing any crime, but this presumption is rebutted by the prosecution when the infant's capacity is satisfactorily established.⁴ In other words, although the burden of proof is upon the state to show that an infant between the age of seven and fourteen is *capax doli*, yet it is a question of fact to be determined by the circumstances of the

case;⁵ and there are several instances in which juries have found persons under fourteen guilty of capital offenses and where the death penalty has been inflicted.⁶ There need not be independent evidence on the question of capacity.⁷ At common law a female under ten years of age was deemed *incapable of consenting to sexual intercourse*.⁸ This is generally regulated by statute in the United States. In this country statutes generally prescribe the *age of consent to the marriage contract*. But at common law males under fourteen and females under twelve were conclusively presumed incapable of consent to the marriage contract.⁹

1, 1 Hale P. C. 27; 1 Hawk. P. C. 2; 4 Bl. Com. 23; 1 Bish. Cr. L. sec. 468. As to presumptions relating to the capacity of children to commit crimes, see full note, 70 Am. Dec. 494; also note, 5 Crim. Law Mag. 213.

2, Rex v. Eldershaw, 3 Car. & P. 396; Rex v. Groombridge, 7 Car. & P. 582; Reg. v. Phillips, 8 Car. & P. 736; Reg. v. Jordan, 9 Car. & P. 118.

3, Williams v. State, 14 Ohio 222; 45 Am. Dec. 536; Hiltabiddle v. State, 35 Ohio St. 52; 35 Am. Rep. 592; Com. v. Green, 2 Pick. 380; Heilman v. Com., 84 Ky. 457; 4 Am. St. Rep. 207. Contra, State v. Sam, Winst. (N. C.) 390.

4, Stone v. Goin, 9 Humph. (Tenn.) 175; State v. Pugh, 7 Jones (N. C.) 61; Com. v. Mead, 10 Allen 398; People v. Kendall, 25 Wend. 399; 37 Am. Dec. 240; Martin v. State, 90 Ala. 602; 24 Am. St. Rep. 844.

5, Willet v. Com., 13 Bush (Ky.) 230; State v. Adams, 76 Mo. 355; State v. Fowler, 52 Iowa 103; Angelo v. People, 96 Ill. 209; 36 Am. Rep. 132; Carr v. State, 24 Tex. App. 562; 5 Am. St. Rep. 905.

6, *Spigurnel's Case*, 1 Hale P. C. 26; *Alice de Walborough's Case*, 1 Hale P. C. 26; *Embyns Case*, 1 Hale P. C. 25.

7, *State v. Leonard*, 41 Vt. 585; *State v. Toney*, 15 S. C. 409.

8, *O'Meara v. State*, 17 Ohio St. 516; 3 Greenl. Ev. sec. 211; 4 Bl. Com. 212.

9, 1 Bish. Mar. & Div. sec. 568; 1 Bl. Com. 436; *Pool v. Pratt*, 1 Chap. D. (Vt.) 252; *Arnold v. Earle*, 2 Lee 529; *Governor v. Rector*, 10 Humph (Tenn.) 57; *Parton v. Hervey*, 1 Gray 119; *Rex v. Gordon*, Russ. & R. Cr. Cas. 48.

§ 98. Same subject — Testamentary capacity — Domicil — Necessaries — Torts.

At common law male infants might make a valid will of personal estate at the age of fourteen and females at the age of twelve, but before those ages they were presumed incompetent to make a will.¹ In the United States there are generally local statutes regulating the age at which infants are deemed to be of testamentary capacity.² The *domicil* of infants is presumed to be the same as the domicil of the parents.³ It is also presumed that persons under twenty-one years of age are *not emancipated*, but under parental control.⁴ Another presumption is that when an infant lives with his father or mother or guardian, he is properly supplied with *necessaries*; hence he is not liable for goods furnished him in the absence of evidence rebutting the presumption.⁵ When the infant is supplied with necessaries by his parent or

guardian or with money to purchase the same, it is presumed that he does not need credit for such purpose.⁶ Generally in *actions for tort* the liability of the defendant does not depend upon the intent, although the malice or intent may affect the measure of damages. Hence in civil actions for tort there is no such presumption of incapacity on the part of infants as is found in the criminal law; and there are numerous cases in which judgments have been rendered against infants for torts although under seven years of age.⁷ While in civil actions the law does not fix any arbitrary age when an infant is deemed incapable of exercising judgment and discretion, there are numerous instances in which courts have conclusively presumed children of tender years incapable of contributory negligence and have refused to submit the question to the jury.⁸ The cases show that this presumption has been indulged by the court respecting children varying in age from one to seven years.⁹ Each case must depend upon the intelligence and capacity of the child and the surrounding facts rather than upon any arbitrary rule. It cannot be said on the one hand that a child just past seven years is *sui juris* so as to be charged with negligence, nor on the other hand that a child just under that age is wholly incapable of exercising care.¹⁰ It has generally been held that, since there

is no exact period fixed by the law at which there is no doubt as to whether the child is *sui juris*, the question of intelligence and ability to exercise care is for the jury under proper instructions from the court.¹¹ But it has been held that, in the absence of proof to the contrary, a child fourteen years of age is presumed to have sufficient capacity to be sensible of danger and to have the power to avoid it.¹²

1, 1 Redf. Wills sec. 4; Deane v. Littlefield, 1 Pick. 239; Campbell v. Browder, 7 Lea (Tenn.) 240.

2, Sprague v. Litherberry, 4 McLean (U. S.) 442.

3, Cragin v. Hewitt (1892) 3 Ch. 180; In re Beaumont (1893) 3 Ch. 490; Schoul. Dom. Rel. sec. 230.

4, Fitzwilliam v. Troy, 6 N. H. 166; Oxford v. Rumney, 3 N. H. 331. See note, 18 Am. St. Rep. 652.

5, Assignees of Hull v. Connolly, 3 McCord (S. C.) 6; 15 Am. Dec. 612; Jones v. Calvin, 1 McMull. (S. C.) 14; Perrin v. Wilson, 10 Mo. 451; State v. Cook, 12 Ired. (N. C.) 67; Freeman v. Bridger, 4 Jones (N. C.) 1; 67 Am. Dec. 258. But see Parsons v. Keys, 43 Tex. 557. See note, 18 Am. St. Rep. 652.

6, Nicholson v. Spencer, 11 Ga. 607; Nicholson v. Wilborn, 13 Ga. 467; Rivers v. Gregg, 5 Rich. Eq. (S. C.) 274.

7, As an illustration, see Huchting v. Engel, 17 Wis. 230; 84 Am. Dec. 741. See full notes on the subject, citing many cases, 33 Am. Dec. 179; 18 Am. St. Rep. 720.

8, Chicago Ry. Co. v. Gregory, 58 Ill. 226; Gavin v. Chicago, 97 Ill. 66; 37 Am. Rep. 99; Walters v. Chicago Ry. Co., 41 Iowa 71; Mangam v. Brooklyn Ry. Co., 38 N. Y. 455; 98 Am. Dec. 66; Ihl v. Forty-second St. Ry. Co., 47 N. Y. 317; 7 Am. Rep. 450; Kay v. Pennsylvania Ry. Co., 65 Pa. St. 269; Pennsylvania Co. v. James, 81 Pa. St. 194; Norfolk Ry. Co. v. Ormsby, 27 Gratt. (Va.) 455;

Gardner v. Grace, 1 Fost. & F. 359; Chicago Ry. Co. v. Ryan, 131 Ill. 474.

9, See cases last cited.

10, Stone v. Dry Dock Co., 115 N. Y. 104; Indiana Ry. Co. v. Pizer, 109 Ind. 179.

11, Houston Ry. Co. v. Simpson, 60 Tex. 103; Strawbridge v. Bradford, 128 Pa. St. 200; Dealey v. Muller, 149 Mass. 432; Birkett v. Knickerbocker Ice Co., 110 N. Y. 504; Railroad Co. v. Gladmon, 15 Wall. 401.

12, Nagle v. Alleghany Ry. Co., 88 Pa. St. 35; 32 Am. Rep. 413.

§99. Presumption as to identity.—

Since names are used for the very purpose of identifying persons, it is frequently presumed that a given name identifies the person bearing such name. Thus in proving title to land where the same name appears in different conveyances as grantee and grantor the circumstance may be such as to reasonably create the presumption that they describe the same person.¹ Among other illustrations which might be mentioned, this presumption of identity of person from identity of name has been applied in respect to letters,² bills of exchange and acceptances,³ powers of attorney,⁴ judgments,⁵ indictments,⁶ names of witnesses in a record of conviction,⁷ or names in the service of process.⁸ The weight to be attached to this presumption of course varies greatly with the circumstances of the case. If the name is a very common one, or if it appears that there are several persons of the

same name and location,⁹ or that the presumption would establish an inconsistent relation,¹⁰ the identity of persons is not to be inferred from identity of name.¹¹ But it is otherwise if the *name is unusual* or if there is identity of name with corroborating circumstances as similarity of age, occupation, place of abode.¹² The fact that the *family* name and initials are the same raises no presumption that the parties are the same.¹³ If *father and son* have the same name, in the absence of proof, it will be presumed, when the name is used without any addition of senior or junior, that the father is intended.¹⁴ This has been illustrated in the case of legacies, notes and other instruments; but it is a presumption which may be easily rebutted by circumstances showing another intention.¹⁵ Indeed, most of the cases which have been cited are authority for the proposition that the presumption under discussion is one which may be easily rebutted by satisfactory proof.

1, Atchison v. McCulloch, 5 Watts (Pa.) 13; Brown v. Metz, 33 Ill. 339; 85 Am. Dec. 277; Cross v. Martin, 46 Vt. 14; Givens v. Tidmore, 8 Ala. 566; Bogue v. Bigelow, 29 Vt. 179; Heacock v. Dubaker, 108 Ill. 641; Hunt v. Stewart, 7 Ala. 527; Campbell v. Wallace, 46 Mich. 320; Gilman v. Sheets, 78 Iowa 499; Smith v. Gillum, 80 Tex. 120. On this general subject see note, 17 L. R. A. 824. A large number of cases have also been collected in 9 Am. & Eng. Ency. Law 683-687.

2, Harrington v. Foy, 1 Ryan & M. 90.

3, Roden v. Ryde, 4 Q. B. 626; Warren v. Anderson, 8 Scott 384; Greenshields v. Crawford, 9 M. & W. 314.

4, Burford v. McCue, 53 Pa. St. 327.

5, Douglas v. Dakin, 46 Cal. 49; Mallory v. Riggs, 76 Iowa 548.

6, State v. Kelsoe, 76 Mo. 505.

7, People v. Rolfe, 61 Cal. 541; State v. McGuire, 87 Mo. 642.

8, Veasey v. Brigman, 93 Ala. 548.

9, Jones v. Jones, 9 M. & W. 75; Altman v. Timm, 93 Ind. 158; Goodell v. Hibbard, 32 Mich. 48. But see Flowmoy v. Warden, 17 Mo. 436.

10, Cooper v. Poston, 1 Dunl. 92, maker and payee of note having same name; Ellsworth v. Moore, 5 Iowa 486.

11, Wickerhorn v. People, 2 Ill. 128; Cozzens v. Gillespie, 4 Mo. 82.

12, Hamilton v. Foy, 1 Ryan & M. 90; Janes v. Parker, 20 N. H. 31; Hodgkinson v. Willis, 3 Camp. 401; Smith v. Henderson, 9 M. & W. 798; Hennel v. Lyon, 1 Barn. & Ald. 182. The presumption does not apply if the transactions are very remote, Sitler v. Gehr, 105 Pa. St. 577.

13, Jones v. Turnour, 4 Car. & P. 204; Loudon v. Walpole, 1 Ind. 319; Bennett v. Libhart, 27 Mich. 489; Burford v. McCue, 53 Pa. St. 431; Houk v. Barthold, 73 Ind. 22.

14, Sweeting v. Fowler, 1 Stark. 106; State v. Vittum, 9 N. H. 519; Jones v. Newman, 1 W. Black. 60; Kincaid v. Howe, 10 Mass. 203; Jarman v. Hooper, 5 Man. & G. 827; Graves v. Colwell, 90 Ill. 613, it is error to exclude evidence of the surrounding circumstances to explain the acts in question.

15, Lepiot v. Browne, 1 Salk. 7; Stebbing v. Spicer, 8 C. B. 827; Sweeting v. Fowler, 1 Stark. 106.

§ 100. Conflicting presumptions — That of innocence prevails over other presumptions.— It frequently happens that

one presumption stands opposed to another, and that it becomes necessary to determine which one shall prevail. Generally speaking there is no legal presumption so highly favored as that of innocence; and in numerous cases other presumptions have yielded to this. Thus it has frequently been held that a jury might presume the death of the husband or wife when the other spouse had married a second time, allowing the presumption of innocence to prevail over that of *continuance of life*.¹ It is not necessary in order that the presumption of continuance of life be overcome in such cases, that absence should continue over seven years; a much less period of time has been held sufficient.² But it does not follow that the presumption of innocence will prevail in all cases where the presumption of the continuance of life would impute crime;³ by the weight of authority there is no rigid presumption in this case to be inflexibly followed aside from the circumstances of the case. It is a question of fact to be determined upon the evidence of the particular case, including the length of time of absence and the age, condition, health and habits of the absent party, as well as the other circumstances of the case.⁴ Of course where the absence has been long continued and the absent party long unheard of, the presumption of innocence may well be held to prevail over the other as a

matter of law.⁵ On the same principle it has been presumed that a divorce from a former marriage had been obtained, thus allowing the presumption of innocence to prevail over that of the *continuance of the existing state of things*.⁶ In like manner the presumption of innocence prevails over the presumption of *payment*⁷ and over that of *marriage* arising from cohabitation and repute,⁸ but where it is shown that a cohabitation was illicit in its origin, it is presumed to have continued of that character until rebutted.⁹

1, Cartwright v. McGown, 121 Ill. 388; 2 Am. St. Rep. 105; Johnson v. Johnson, 114 Ill. 611; 55 Am. Rep. 883; Blanchard v. Lambert, 43 Iowa 228; 22 Am. Rep. 245; Sneathen v. Sneathen, 104 Mo. 201; 24 Am. St. Rep. 326; Price v. Price, 124 N. Y. 589; Charles v. Charles, 41 Minn. 201; Rex v. Twining, 2 Barn. & Ald. 386; Breiden v. Paff, 12 Serg. & R. (Pa.) 430; Hynes v. McDermott, 91 N. Y. 451; 43 Am. Rep. 677; In re Taylor, 9 Paige Ch. (N. Y.) 611; Fenton v. Reed, 4 Johns. (N. Y.) 52; 4 Am. Dec. 244; Donnelly v. Donnelly, 8 B. Mon. (Ky.) 113; Yates v. Houston, 3 Tex. 433; Dickerson v. Brown, 49 Miss. 357.

2, Johnson v. Johnson, 114 Ill. 611; 55 Am. Rep. 883; and also cases cited in Rex v. Twining, 2 Barn. & Ald. 386. As to presumptions of continuance of life and death, see sec. 56 *et seq. supra*; as to presumptions of innocence see sec. 11 *et seq. supra*.

3, Rex v. Harborne, 2 Adol. & Ell. 540, absence of only twenty days; Johnson v. Johnson, 114 Ill. 611; 55 Am. Rep. 883.

4, Johnson v. Johnson, 114 Ill. 611; 55 Am. Rep. 883; Rex v. Harborne, 2 Adol. & Ell. 540; Greensborough v. Underhill, 12 Vt. 604; Northfield v. Plymouth, 20 Vt. 582.

5, Kelly v. Drew, 12 Allen 107, sixteen years; Harris v. Harris, 8 Bradw. (Ill.) 57, nine years. This subject is dis-

cussed and many cases cited in *Johnson v. Johnson*, 114 Ill. 611; 55 Am. Rep. 883.

6, *Carroll v. Carroll*, 20 Tex. 731; *Blanchard v. Lambert*, 43 Iowa 228. Divorce may be presumed in favor of innocence, although there is no evidence of such divorce, see sec. 13 *supra*.

7, *Potter v. Titcomb*, 7 Me. 302.

8, *Clayton v. Wardell*, 4 N. Y. 230. For presumptions as to marriage in actions for bigamy, adultery and the like, see secs. 13 and 85 *et seq. supra*.

9, See discussion of this subject, sec. 88 *supra*.

§ 101. Continued—Presumption of innocence of a party overcomes the presumption of innocence of a stranger.—The court will indulge the presumption of innocence in favor of the accused, when such presumption is met by a counter-presumption of innocence on the part of a stranger. In a prosecution for bigamy it became necessary for the state to prove a marriage in Prussia. There was evidence of a religious ceremony, but no proof of a civil contract before a magistrate which the Prussian law required. It was argued that as the religious ceremony was a violation of the penal law without such prior contract, it should be presumed. But the court refused to so hold on the ground that to do so would overcome the presumption of the prisoner's innocence by the no stronger presumption of the innocence of a stranger in a proceeding in which the stranger was not on trial.' And in the prose-

cution for the seduction of a female of previous chaste character, the accused is so far presumed innocent of the entire offense that the state must prove the previous chaste character of the prosecutrix. The presumption of chastity must yield to the presumption of innocence.²

1, *Weinberg v. State*, 25 Wis. 370.

2, *West v. State*, 1 Wis. 209. See, however, *State v. Wells*, 48 Iowa 671; *Slocum v. People*, 90 Ill. 274.

§ 102. Innocence — Sanity — Weight of conflicting presumptions.—There has been and still is a great conflict of opinion as to the relative weight to be given to the presumption of innocence and to the presumption of sanity in criminal cases. It has been held that the burden rests on the defendant who pleads insanity to prove the insanity beyond a reasonable doubt.¹ But it need hardly be argued that this view is contrary to sound principle and the weight of authority. A more difficult question is whether the burden is on the defendant to establish this proposition by the preponderance of evidence or whether it is incumbent on the prosecution to prove the sanity of the defendant, like other facts, beyond a reasonable doubt.² Perhaps the greater number of adjudicated cases hold that in such case the burden is upon the defendant.³ But many well considered cases hold the rule that, when evidence is given in

a criminal case tending to show the insanity, the burden rests upon the state to show beyond a reasonable doubt as one of the elements of guilt that the defendant is not insane.⁴ "The *relative weight of conflicting presumptions* of law is, of course, to be determined by the court or judge,—who should also direct the attention of the jury to the burden of proof as affected by the pleadings and to the evidence in each case. And although the decision of questions of fact constitutes the peculiar province of the jury, they ought, especially in civil cases to be guided by the rules regulating the burden of proof and the weight of conflicting presumptions, which are recognized by law and have their origin in natural equity and convenience."⁵

1, Com. v. Fddy, 7 Gray 583; State v. Redemeier, 71 Mo. 173; 36 Am. Rep. 462; Baccigalupo v. Com., 33 Gratt. (Va.) 807; 36 Am. Rep. 795; Lynch v. Com., 77 Pa. St. 205; State v. Lawrence, 57 Me. 574; People v. Coffman, 24 Cal. 230; State v. Spencer, 1 Zab. (N. J.) 196; State v. Derrance, 34 La. An. 186; 44 Am. Rep. 426. For further discussion see sec. 186 *infra*.

2, Bolling v. State, 54 Ark. 588; People v. McNulty, 93 Cal. 427; State v. Trout, 74 Iowa 545; 7 Am. St. Rep. 499; State v. Alexander, 30 S. C. 74; 14 Am. St. Rep. 879; Parsons v. State, 81 Ala. 577; 60 Am. Rep. 193 and note; State v. McCoy, 34 Mo. 531; 86 Am. Dec. 121; State v. Marler, 2 Ala. 43; 36 Am. Dec. 398 and note; Com. v. Rogers, 7 Met. 500; 41 Am. Dec. 458; Ortwein v. Com., 76 Pa. St. 414; 18 Am. Rep. 420; O'Connell v. People, 87 N. Y. 377; 41 Am. Rep. 379.

3, People v. Dillon, 8 Utah 92. See also Montag v. People,

141 Ill. 75; *Fisher v. State*, 30 Tex. App. 502; *Maxwell v. State*, 89 Ala. 150.

4, *Plake v. State*, 121 Ind. 433; 16 Am. St. Rep. 408 and note; *Hodge v. State*, 26 Fla. 11; *People v. Garbutt*, 17 Mich. 9; 97 Am. Dec. 162; *Guetig v. State*, 66 Ind. 94; 32 Am. Rep. 99; *Cunningham v. State*, 56 Miss. 269; 31 Am. Rep. 360. Nor need the defendant prove insanity beyond a reasonable doubt, *Armstrong v. State*, 27 Fla. 366; 26 Am. St. Rep. 72; *Com. v. Gerade*, 145 Pa. St. 289; 27 Am. St. Rep. 689.

5, Best Ev. (Chamb. Ed.) sec. 329.

§ 103. General rules as to presumptions.—We close this subject by calling attention to certain rules of general application. Perhaps the most important is that presumptions must be *based upon facts* and not upon inferences or upon other presumptions. "No presumption can with safety be drawn from a presumption."¹ The fact presumed should have direct relation with the fact from which the presumption is drawn;² but when the facts are established from which presumptions may be legitimately drawn, it is the province of the jury to deduce the presumption or inference of fact.³ If the connection is too remote or uncertain it is the duty of the court to either exclude the testimony from which the presumption is sought to be deduced or to instruct the jury that the evidence affords no proper foundation for any presumption.⁴ Thus it would be irrelevant as bearing on the negligence of a driver of a street car, that other drivers of the company are overworked.⁵

If however the facts are clearly established, forming a proper basis for a presumption of law, the *jury has no right to disregard* the presumption which the law raises. The presumption in such case is one deriving its force from the law and not merely from processes of reasoning.⁶ When a disputable presumption has been met by proofs and the burden shifted, the conflicting evidence is to be weighed and the verdict rendered in civil cases in favor of the party whose proofs have most weight; and in this latter process the presumption of law loses all that it had of mere arbitrary power and must be regarded only from the stand-point of logic and reason and valued and given effect only as it has evidential character.⁷

1, United States v. Ross, 92 U. S. 281; Douglass v. Mitchell's Ex., 11 Casey (Pa.) 440.

2, United States v. Ross, 92 U. S. 281.

3, Ham v. Barrett, 28 Mo. 388; Best Pres. 46.

4, Manning v. Insurance Co., 100 U. S. 693; United States v. Ross, 92 U. S. 281.

5, Philadelphia Passenger Ry. Co. v. Henrice, 92 Pa. St. 431.

6, Ham v. Barrett, 28 Mo. 388.

7, Graves v. Colwell, 90 Ill. 651.

CHAPTER 4.

JUDICIAL NOTICE.

- § 104. Meaning of the term.
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- § 106. Foreign flags and seals — State of war or peace.
- § 107. Territorial extent and sub-divisions.
- § 108. Officers of the national government.
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- § 134. Facts not within the memory of the judge.
- § 135. Facts of which jurors take judicial notice.

§ 104. **Meaning of the term.**—It will be seen from the illustrations given in this chapter that there is a great variety of facts which may be safely assumed to be within the knowledge of the court and which therefore need not be maintained by evidence. Of such facts the court is said to take *judicial notice*. General rules have often been prescribed for determining what facts are and what are not matters for judicial cognizance, yet such rules are necessarily too vague and general in their character to afford very valuable aid to the practitioner. We shall therefore present very full illustrations from the adjudicated cases without attempting any very rigid classification. Certain facts may be said to be the subject of judicial notice because they are part of the law of the land, which is presumed to be generally known. Other facts may be properly the subject of judicial notice because they relate to the organization and duties of the court and its officers, and hence may be said to be peculiarly within the cognizance of the judge. But

when we pass from facts of the character already mentioned, the principal guide in determining what facts may be assumed to be judicially known is that of notoriety; and it is clear, especially in the realm of science and the arts, that the circle of facts within the range of common knowledge is constantly extending. In the early text-books on evidence a few paragraphs sufficed to enumerate the facts of which the courts then assumed to take judicial notice; but in the exercise of their discretion, as individual cases have arisen, it will be seen that judges have dispensed with proof of so large a variety of facts, that the state of the law on the subject can only be shown by numerous illustrations from the decided cases.¹

1, See articles on this general subject: James B. Thayer, "Judicial Notice and Law of Evidence," 3 Harv. Law Rev. 285; W. P. Wade "Judicial Notice of Facts," 5 So. Law Rev. (N. S.) 214; Judge P. Bliss, "Of What the Courts Will Take Judicial Notice," 2 Cent. Law Jour. 393, 407; E. W. Metcalfe, "Matters Requiring Judicial Notice," 28 Am. Law Reg. 193, 321, 449. See also exhaustive notes covering the whole subject of judicial notice in 89 Am. Dec. 663-697; 49 Am. Rep. 201-207, and in 4 L. R. A. 33 which gives the provisions of state statutes on this subject.

§ 105. Existence of governments—Domestic and foreign.—The proposition that courts must recognize the existence of the government to which they owe their power is so obvious as to require little illustration or discussion. This implies also

knowledge of the principal departments of government and of their respective powers and duties.¹ Thus the courts require no proof of the time of sessions of parliament or of congress or of state legislatures or of the privileges of members and the usual course of proceedings therein.² When two legislatures claim the power to act, the courts will recognize the lawful one.³ While the courts will take judicial notice of the existence of foreign governments, the rule must be taken with the qualification that it relates only to such governments as have been recognized by the home government. The courts will not anticipate the action of the government in this respect; and in case of a rebellion or a revolt in a foreign state, they will consider the former state of things as existing until the proper department of the government recognizes the change.⁴ But it is the duty of the judge to take notice whether a foreign power has been recognized by the government or not.⁵

1, *Prince v. Skillin*, 71 Me. 361; 36 Am. Rep. 325.

2, *Lake v. King*, 1 Saund. 131; *Birt v. Rothwell*, 1 Ld. Raym. 210, 343; *R. v. Wilde*, 1 Lev. 296; *R. v. Arundel*, Hob. 109, 111; *R. v. Knollys*, 1 Ld. Raym. 10, 15; *Case of Sheriff of Middlesex*, 11 Adol. & Ell. 273; *Cassidy v. Steuart*, 2 Man. & G. 437. But see *Coleman v. Dobbins*, 8 Ind. 156.

3, *Opinion of Justices*, 70 Me. 609.

4, *City of Berme v. Bank*, 9 Ves. 347; *Taylor v. Barclay*,

2 Sim. 213; *U. S. v. Palmer*, 3 Wheat. 610; *The Estrella*, 4 Wheat. 298.

5, *Taylor v. Barclay*, 2 Sim. 213. But see *Dalden v. Bank of England*, 10 Ves. 345.

§ 106. Foreign flags and seals — State of war or peace.—The courts not only recognize foreign states and sovereigns acknowledged as such by the home government of such courts, but also their symbols of authority, such as national flags and seals of state.¹ The public seals of such foreign states are of such public notoriety that no proof of them is required. They import absolute verity;² and when attached to foreign judgments such judgments are sufficiently authenticated.³ In like manner no proof need be given of the seals of foreign maritime and admiralty courts.⁴ The courts take judicial notice of wars with foreign states, if a state of war has been declared by the proper authorities;⁵ but if no such declaration has been made the fact of a state of war is one to be proved.⁶ A war between foreign powers is not judicially noticed.⁷

1, Greenl. Ev. sec. 8. In *Lazier v. Westcott*, 26 N. Y. 146; 82 Am. Dec. 404, the court took judicial notice that the province of Upper Canada is a foreign government and that it has courts and that those courts proceed according to the course of the common law. *Chicago Co. v. Keegan*, 152 Ill. 413.

2, *Coit v. Milliken*, 1 Den. 376; 4 Cowen & Hill's Notes to Phill. Ev. p. 281.

3, *Church v. Hobart*, 2 Cranch 187.

4, *Croudson v. Leonard*, 4 Cranch 435; *Rose v. Himely*, 4 Cranch 292; *Church v. Hobart*, 2 Cranch 187; *Thompson v. Stewart*, 3 Conn. 171; 8 Am. Dec. 168; *Green v. Waller*, 2 Ld. Raym. 891.

5, *Dolder v. Lord Huntingfield*, 11 Ves. 292; *R. v. DeBerenger*, 3 Maule & S. 67; Tayl. Ev. sec. 18.

6, 1 Hale P. C. 164.

7, *Dolder v. Lord Huntingfield*, 11 Ves. 292.

§ 107. Territorial extent and subdivisions — Counties — Towns — Cities, etc.—

The territorial extent of the nation and of the several states and the division of the states into towns, counties and other civil divisions are generally regulated by public laws and are matters of general notoriety. On both of these grounds the courts do not require proof of such facts. "All courts of justice are bound to take judicial notice of the territorial extent of the jurisdiction exercised by the government whose laws they administer, or of its recognition or denial of the sovereignty of a foreign power, as appearing from the public acts of the legislature and executive, although those acts are not formally put in evidence, nor in accord with the pleadings." ¹ In England the courts "notice the territorial extent of the jurisdiction and sovereignty exercised *de facto* by their own government and the local divisions of the country as states, provinces, counties, cities, towns, parishes and the like, so far as the political government is concerned or affected;

but not the relative positions of such local divisions, nor their precise boundaries further than they may be described in public statutes."² In the United States the rule seems to have been carried somewhat further in its application, as will appear from some of the illustrations given below. Thus courts have taken judicial notice of the *boundaries* of the several *states*;³ that a given state constitutes a judicial and a congressional district of the United States;⁴ that there are internal revenue districts and that in some states there are several such *districts* with defined geographical boundaries.⁵ Courts take notice of the division of the state into *counties*, cities and towns,⁶ and of the lines of counties and towns within the state.⁷ Courts will also take judicial notice of a county created by public statute, but not of the time of the division of counties and the creation of new ones by county commissioners under a general law; in the latter case such time, if material, must be proved.⁸ Courts have taken judicial notice of the geographical situation of *towns* in counties within the state;⁹ that a "township" whether used in the sense of a municipal division of a county or of a township according to government survey has no subdivision known as blocks, and that "block" is applied only to the subdivision of a platted town, village or city;¹⁰ of the county in which a town created by law is situated;¹¹

that there is but one county or one township of a given name in the state;¹² that land described as being in a certain township and range is in a certain county;¹³ of the relative situation of counties in the state;¹⁴ that there is no county of a given name in the state;¹⁵ that a county has adopted township organization,¹⁶ and that a given judicial district is within the limits of a certain county.¹⁷ The existence of a town was thus recognized although no legislative act incorporating it could be found, where the supreme court of the state had declared in a former decision that it had been incorporated at a given time, and the legislature had afterwards recognized it.¹⁸ But it has been held that courts cannot take judicial notice that any particular town has availed itself of a general law to become incorporated.¹⁹ Courts know judicially of the existence of towns and cities within the state but not of the existence of *cities* of like names in other states or countries;²⁰ so they take notice that a given county is within the state,²¹ and that a given city or town within the state is within a given county.²² For the purpose of the admission of a deposition, courts take notice that a certain town in the state is more than twenty miles from the place of the trial;²³ that a road is wholly within a given county when the termini are shown.²⁴ If a crime is alleged or proved to have been committed in a given incorporated town of the state, the court will

know in which county it is situate, hence the failure to prove the county is immaterial.²⁵ It was held in one case that a probate court could take judicial notice that a place within the county was an incorporated city, the terminus of a railroad, the location of a post-office and the only one in the state of that name.²⁶ Although the courts have sometimes refused to take judicial notice of large cities in other states, it would seem a reasonable exercise of judicial discretion to take cognizance of the existence of well known cities in the same manner as of the existence of mountains or other well known geographical facts.

1, Jones v. United States, 137 U. S. 214.

2, Tayl. Ev. sec. 17.

3, Thorson v. Peterson, 9 Fed. Rep. 517; Goodwin v. Appleton, 22 Me. 453.

4, United States v. Johnson, 2 Sawy. (U. S.) 482.

5, United States v. Jackson, 104 U. S. 41.

6, Vanderwerker v. People, 5 Wend. 530; La Grange v. Chapman, 11 Mich. 499; Lyell v. Lapeer County, 6 McLean (U. S.) 446; Goodwin v. Appleton, 22 Me. 453; State v. Powers, 25 Conn. 48; Winnipiseogee Lake Co. v. Young, 40 N. H. 420; Dickenson v. Breeden, 30 Ill. 279; Mossman v. Forrest, 27 Ind. 233; Ross v. Reddick, 1 Scam. (Ill.) 73; People v. Breese, 7 Cow. 429; Chapman v. Wilber, 6 Hill 475; State v. Mayor, 11 Humph. (Tenn.) 217.

7, Indianapolis Ry. Co. v. Moore, 16 Ind. 43; Ham v. Ham, 39 Me. 263; State v. Jackson, 39 Me. 291; Kansas City Ry. Co. v. Burge, 40 Kan. 736.

8, Burkingham v. Gregg, 19 Ind. 401.

9, State v. Powers, 25 Conn. 48; State v. Tootle, 2 Har.

(Del.) 541; *Martin v. Martin*, 51 Me. 366; *Vanderwerker v. People*, 5 Wend. 530; *State v. Reader*, 60 Iowa 527; *Hoffman v. State*, 12 Tex. App. 406; *Solyer v. Romont*, 52 Tex. 562; *Kansas City Ry. Co. v. Burge*, 40 Kan. 736; *Clayton v. May*, 67 Ga. 769; *Schilling v. Territory*, 2 Wash. 283.

10, *Herrick v. Morrill*, 37 Minn. 250; 5 Am. St. Rep. 841.

11, *State v. Tootle*, 2 Har. (Del.) 541; *Martin v. Martin*, 51 Me. 366; *Indiana Ry. Co. v. Stephens*, 28 Ind. 429.

12, *Stoddard v. Sloan*, 65 Iowa 680; *People v. Thompson*, 28 Cal. 214.

13, *Togg v. Holcomb*, 64 Iowa 621.

14, *Wright v. Hawkins*, 28 Tex. 452.

15, *State v. Cleveland*, 80 Mo. 108; *Rock Island v. Steele*, 31 Ill. 543.

16, *People v. Robinson*, 17 Cal. 363; *Gilbert v. Moline Co.*, 19 Iowa 315.

17, *Swain v. Comstock*, 18 Wis. 463.

18, *Temple v. State*, 15 Tex. App. 304; 49 Am. Rep. 200; *Hopkins v. Kansas City Ry. Co.*, 79 Mo. 98. The Texas court declined to take notice that the meaning of "St. Louis, Mo." is St. Louis in the State of Missouri, *Ellis v. Park*, 8 Tex. 205. The courts of Missouri held that they could not judicially know that New Orleans is in Louisiana, *Riggin v. Collier*, 6 Mo. 568.

19, *Woodward v. Chicago Ry. Co.*, 21 Wis. 309; *Chapman v. Wilbur*, 6 Hill 475; *Riggin v. Collier*, 6 Mo. 568.

20, *Com. v. Desmond*, 103 Mass. 445.

21, *Solyer v. Romanet*, 52 Tex. 562; For example that Chicago is in Cook county, *Sullivan v. People*, 122 Ill. 385.

22, *Carson v. Dalton*, 59 Tex. 500; *Saukville v. State*, 69 Wis. 178; *Morgan v. State*, 64 Miss. 511; *Hinckley v. Beckwith*, 23 Wis. 328.

23, *Steinmetz v. Versailles Co.*, 57 Md. 457. .

24, *State v. Reader*, 60 Iowa 527; *Luck v. State* 96 Ind. 16.

25, *Smither v. Hournoy*, 47 Ala. 345.

26, *Rice v. Montgomery*, 4 Biss. (U. S.) 75; *Pearce v. Langfit*, 101 Pa. St. 512. Instances where courts refused to take notice of towns in other states, *Woodward v. Railroad Co.*, 21 Wis. 309; *Riggin v. Collier*, 6 Mo. 568.

§ 108. **Officers of the national government.**—The rule was declared in an English case¹ that the courts will recognize all public matters which affect the government of the country. On this principle the accession and death of the sovereign and principal officers of state are recognized; and in the United States, in many cases, the courts have recognized the rule and have so extended its application as to include many subordinate officers. Thus they recognize the chief magistrate of the state and nation and the principal officers of the federal government, the time of their accession to office, their terms of service, their public duties and in some cases their public acts.² Clearly the rule would include members of the cabinet, United States senators, judges of the supreme and other federal courts, foreign ministers, United States marshals³ and it has been held to include the heads of bureaus; thus in a case where a patent was signed by an acting commissioner of patents the court held it proper to take notice judicially of the persons who from time to time preside over the patent office whether permanently or transiently.⁴

1, *Taylor v. Barclay*, 2 Sim. 21. As to proof of appointment of public officers, see sec. 204 *infra*.

2, *Major v. State*, 2 Sneed (Tenn.) 11; *York Railway v. Winans*, 17 How. 30; *Brown v. Piper*, 91 U. S. 37; *Hizer v. State*, 12 Ind. 330; *Linny v. Attorney General*, 33 Miss. 508; *State v. Williams*, 5 Wis. 308; *Deweese v. Colorado Company*, 32 Tex. 570; *Wells v. Company*, 47 N. H. 235; *Elderton Case*, 2 Ld. Raym. 980; *Rex v. Jones*, 2 Camp. 131; *Lord Melville's Case*, 29 How. St. Tr. 707.

3, *Walden v. Canfield*, 2 Rob. (La.) 466; *Major v. State*, 2 Sneed (Tenn.) 11; *York Railway Company v. Winans*, 17 How. 30; *Brown v. Piper*, 91 U. S. 37.

4, *York Railway Company v. Winans*, 17 How. 30. The same rule was applied in *Keyser v. Hitz*, 133 U. S. 138, where the court took judicial notice that a certain man was deputy comptroller of the currency at a given time.

§ 109. **State and subordinate officers.** In like manner the state courts judicially notice similar facts as to the principal officers of the state, executive, legislative and judicial.¹ On this principle it has been held that the courts of last resort will judicially notice who are the judges of the subordinate courts² as well as the resignation of circuit judges.³ In North Carolina judicial notice was taken of the judicial districts of the state and of where the several judges were at a given time in the discharge of their duty.⁴ The office of *sheriff* has long been deemed an important one, and such officials will be thus recognized in all courts of the state, and their appointment or election or retirement from office need not be proved, especially in any collateral proceedings.⁵ But

by the weight of authority deputy sheriffs and deputy marshals are not presumed to be known as such. They are not commissioned in any public manner and their authority is liable to be revoked by their principal at any moment.⁶ Although the rule has been more often applied and more broadly stated in the case of sheriffs than of other county officers, there seems no good reason for confining its operation to that class. *Other county offices* are equally public in their nature and in some instances equally important.⁷ Thus it has been recently held that the circuit court of one county is bound to take judicial notice as to whether a person signing an execution issued by a circuit court of another county is, in fact, clerk of that court; and that the court may inform itself of that fact in any way it may deem best and is not bound to receive oral evidence to disprove such fact.⁸ We find that courts have thus taken judicial notice of registers and of recorders and of their signatures,⁹ of tax collectors,¹⁰ clerks of the court¹¹ and of county clerks.¹² The rule has been declared that the court will take judicial notice of all civil officers of the county in which it holds its sessions and that no proof of official character is necessary, unless that question is directly in issue.¹³ In several cases it has been held that courts will take notice of the official character of *justices of the peace*

in the county where the court is held.¹⁴ It goes without saying that the courts take judicial notice of what is prescribed by public law, as to the official character,¹⁵ duties, powers, jurisdiction,¹⁶ existence,¹⁷ times of election,¹⁸ expiration of terms of office¹⁹ and terms of office of public officers.²⁰

1, Dewees v. Colorado Co., 32 Tex. 570; State v. Williams, 5 Wis. 313; Lindsey v. Attorney General, 33 Miss. 508; People v. Johr, 22 Mich. 461; Gilliland v. Administrators of Sellers, 2 Ohio St. 223. See notes, 13 Am. Dec. 192; 20 L. R. A. 382, on the general subject of this section.

2, Kilpatrick v. Com., 31 Pa. St. 198; Clark v. Com., 29 Pa. St. 129; Russell v. Sargeant, 7 Ill. App. 98. But the supreme court of Ohio declined to thus recognize the duration of its own sessions, Gilliland v. Administrators of Sellers, 2 Ohio St. 223.

3, *Ex parte* Peterson, 32 Ala. 74.

4, State v. Ray, 97 N. C. 510.

5, Alexander v. Burnham, 18 Wis. 199; Martin v. Aultman Co., 80 Wis. 150; Thompson v. Haskell, 21 Ill. 215; Rayland v. Wymas's Adm., 37 Ala. 32; Ingram v. State, 27 Ala. 17.

6, Slaughter v. Barnes, 3 A. K. Marsh. (Ky.) 412; 13 Am. Dec. 190; Hummelmann v. Hoadley, 44 Cal. 214; State Bank v. Curran, 10 Ark. 142; Land v. Patterson, Minor (Ala.) 14; Ward v. Henry, 19 Wis. 76; Joyce v. Joyce, 5 Cal. 449; 1 Greenl. Ev. sec. 6.

7, Wetherbee v. Dunn, 32 Cal. 106 (tax collector); Ingram v. State, 27 Ala. 17 (sheriff); Fancher v. DeMonlegre, 1 Head (Tenn.) 40 (register); Kilpatrick v. Com., 31 Pa. St. 198; Russell v. Sargeant, 7 Ill. App. 98 (judge); Hummelmann v. Hoadley, 44 Cal. 214; Joyce v. Joyce, 5 Cal. 449; Dyer v. Flint, 21 Ill. 80; Fox v. Com., 81 Pa. St. 511; Collins v. State, 58 Ind. 5. See note, 89 Am. Dec. 682-685.

8, *White v. Rankin*, 90 Ala. 541.

9, *Fancher v. DeMonlegre*, 1 Head (Tenn.) 40 (register); *Scott v. Jackson*, 12 La. An. 640 (recorder).

10, *Burnett v. Henderson*, 31 Tex. 588; *Wetherbee v. Dunn*, 32 Cal. 106; *Templeton v. Morgan*, 16 La. An. 438.

11, *White v. Rankin*, 90 Ala. 541.

12, *Stinson v. Russell*, 2 Overt. (Tenn.) 40; *Burton v. Pettibone*, 5 Yerg. (Tenn.) 442; *Major v. State*, 2 Sneed (Tenn.) 11; *State v. Cole*, 9 Humph. (Tenn.) 626. See note, 13 Am. Dec. 192.

13, *Dyer v. Flint*, 21 Ill. 80; *Thielmann v. Burg*, 73 Ill. 293; *Wetherbee v. Dunn*, 32 Cal. 106; but not of the locality of his office, *Allen v. Scharringhausen*, 8 Mo. App. 229; as to aldermen, *Hibbs v. Blair*, 14 Pa. St. 413; *Fox v. Com.*, 81 Pa. St. 516; as to constables and other town officers, *State v. Manley*, 1 Overt. (Tenn.) 428.

14, *Ede v. Johnson*, 15 Cal. 53; *Fox v. Com.*, 81 Pa. St. 511; *Graham v. Anderson*, 42 Ill. 514; 92 Am. Dec. 89.

15, *Fox v. Com.*, 81 Pa. St. 511.

16, *Inglis v. State*, 61 Ind. 212; *People v. Lyman*, 2 Utah 30; *County of Sacramento v. Central Pacific Ry. Co.*, 61 Cal. 250; *Stiles v. Stewart*, 12 Wend. 473; 27 Am. Dec. 142; *Masterson v. Matthews*, 60 Ala. 260.

17, *State v. Dahl*, 65 Wis. 510, existence of school districts and duties of officers.

18, *State v. Minnick*, 15 Iowa 123; *United States v. Morrissey*, 32 Fed. Rep. 147.

19, *Stubbs v. State*, 53 Miss. 437.

20, *Stubbs v. State*, 53 Miss. 437; *State v. Williams*, 5 Wis. 308.

§ 110. Officers—Notaries public.—Although the seals of officers in foreign countries and sister states are recognized when there is proper compliance with the statutes

for authenticating documents, the courts do not in other cases generally recognize the acts of subordinate officers of other states or countries.¹ Thus the courts in Wisconsin refused to notice judicially that there are county judges in New York authorized to administer oaths.² But in the interests of commerce the rules of evidence have been so extended that the acts of notaries public in the discharge of their duties under the law merchant are judicially noticed in all courts; and their proper official acts under the law merchant are *prima facie* sufficiently authenticated by their seals.³ For example, the notarial certificate of presentment and non-payment in an action on a foreign bill of exchange is judicially noticed.⁴ It was held at common law that the seal should be impressed upon wax or some other tenacious substance;⁵ but that is no longer necessary.⁶ In the discharge of duties other than under the law merchant the acts of notaries will not be judicially noticed except on principles common to other officers or pursuant to statutes. In a recent case in Iowa where a notary had signed a jurat in that state simply as notary without designating his county and had affixed his seal, the court required no proof that he was a notary for that county.⁷ Judicial notice has been taken of a notary's term of office,⁸ and of the notaries in the county and of their seals and signatures.⁹

1, *Morse v. Hewett*, 28 Mich. 481. As to judicial notice

of seals, see sec. 647 *infra*. On this general subject see note, 58 Am. Rep. 440.

2, *Fellows v. Menasha*, 11 Wis. 558. But courts know judicially that tribunals exist in other states for the administration of justice, *Dozier v. Joyce*, 8 Port. (Ala.) 303.

3, *Delafield v. Hand*, 3 Johns. 314; *Pierce v. Indseth*, 106 U. S. 546; *Browne v. Philadelphia Bank*, 6 Serg. & R. (Pa.) 484; 9 Am. Dec. 463; *Bours v. Zachariah*, 11 Cal. 281; *Grand Rapids v. Hastings*, 36 Mich. 123; *Stephens v. Williams*, 46 Iowa 540; *Gage v. Dubuque & P. Ry. Co.*, 11 Iowa 310; *McKeller v. Peck*, 39 Tex. 381; *Dumont v. McCracken*, 6 Blatchf. (U. S.) 355; *Dale v. Wright*, 57 Mo. 110; *Second National Bank v. Chancellor*, 9 W. Va. 69; *Denmead v. Maack*, 2 McArth. (D. C.) 475; *Stoddard v. Sloan*, 65 Iowa 680; *Rindskoff v. Malone*, 9 Iowa 540; 74 Am. Dec. 367 and long note.

4, *Pierce v. Indseth*, 106 U. S. 546.

5, *Coit v. Milliken*, 1 Den. 376.

6, *Pierce v. Indseth*, 106 U. S. 546.

7, *Stoddard v. Sloan*, 65 Iowa 680.

8, *Cary v. State*, 76 Ala. 78.

9, *Thielman v. Bing*, 73 Ill. 293; *Denmead v. Maack*, 2 McArth. (D. C.) 475; *Stoddard v. Sloan*, 65 Iowa 680.

§ 111. Official signatures and seals.—

In England there are many statutes providing that the courts shall take judicial notice of the signatures of public officials; but in the absence of statutes the signatures must be proved. In his work on evidence Mr. Taylor suggests the view that the courts would not recognize the signatures of the lords of the treasury and doubts whether the royal sign manual would be thus noticed.¹ A more liberal rule has prevailed in the United

States; and courts will recognize the seals and signatures of the chief magistrate, of the heads of departments and principal officers of the government, state and national,² and of the officers of the court.³ As we have seen in the last section the seals and signatures of other of the subordinate officers within the state are thus often judicially noticed.⁴ In this country judicial notice will also be taken of the seals of all infra-territorial courts which are entitled to have seals; and federal judges will take notice of the seals of the several state courts.⁵

1, Tayl. Ev. sec. 14; R. v. Miller, 2 W. Black. 797; R. v. Guilly, 1 Leach Cr. Cas. 98. As to judicial notice of seals, see sec. 647 *infra*. On this general subject see note, 13 Am. Dec. 193.

2, Wells v. Company, 47 N. H. 235; People v. John, 22 Mich. 46; *Ex parte* Patterson, 33 Ala. 74; 1 Greenl. Ev. sec. 5.

3, Dyer v. Last, 51 Ill. 179; State v. Postlewait, 14 Iowa 446; Yell v. Lane, 41 Ark. 53; Henmann v. Mink, 99 Ind. 279; State v. Cole, 9 Humph. (Tenn.) 626; Mackinnon v. Barnes, 66 Barb. 9; Major v. State, 2 Sneed (Tenn.) 11; People v. Lyman, 2 Utah 30; Norvell v. McHenry, 1 Mich. 227; Sacramento v. Cen. Pac. Ry. Co., 61 Cal. 250; Bishop v. State, 30 Ala. 34; Burton v. Pettibone, 5 Verg. (Tenn.) 443; 2 Cent. Law Jour. 447.

4, Other instances are those of justices of the peace, *Ede v. Johnson*, 15 Cal. 53; *Fox v. Com.*, 81 Pa. St. 511; district attorneys, *People v. Lyman*, 2 Utah 30; clerks of the court, *Bishop v. State*, 30 Ala. 34; *Burton v. Pettibone*, 5 Verg. (Tenn.) 443; *Major v. State*, 2 Sneed (Tenn.) 11; collectors, *Wetherbee v. Dunn*, 32 Cal. 106.

5, Whart. Ev. sec. 321.

§112. Law of the forum—International law—Foreign treaties.—The law of the jurisdiction is peculiarly a matter of judicial cognizance. It is only on the presumption that the law is known to the court that there can be any proceedings whatever in courts of justice. It is therefore elementary that the *law of nations*, treaties with foreign powers, the constitution of the United States and its amendments, the public statutes of the United States, as well as the public statutes of the state and the common law will be judicially noticed in all courts.¹ While foreign municipal laws must be proved as facts, those rules which by the common consent of mankind have been acquiesced in as law stand upon an entirely different footing. The courts are presumed to know those rules of conduct which have been generally adopted by the nations of the world in their commercial or other intercourse; hence no proof thereof is required.² By the constitution of the United States "all *treaties* made or which shall be made under the authority of the United States shall be the supreme law of the land and the judges in every state shall be bound thereby anything in the constitution or laws of any state to the contrary notwithstanding."³ There are frequent illustrations of this recognition without proof of treaties; for example that, by the Ashburton treaty, murder is a crime in the

British Dominions for the perpetration of which a fugitive is liable to be reclaimed;⁴ that there is in force a treaty between the United States and France affording privileges in France to the citizens of the United States, similar to those given by the trade mark laws of the United States;⁵ that a portion of the territory of New York was by its own act ceded to the state of Massachusetts and that afterwards under the authority of both states and of the nation the title of the Indians thereto was extinguished;⁶ that a certain treaty with the Indians was made at a given date, and that many titles depended thereon.⁷

1, *The Scotia*, 14 Wall. 170; *Lane v. Harris*, 16 Ga. 217; *Horn v. Chicago Ry. Co.*, 38 Wis. 463; *Heaston v. Cincinnati Ry. Co.*, 16 Ind. 275; *Dolph v. Barney*, 5 Ore. 191; *State v. Jarrett*, 17 Md. 309; *Pierson v. Baird*, 2 G. Greene (Iowa) 215; *State v. O'Connor*, 13 La. An. 486; *Jewell v. Center*, 25 Ala. 498; *Graves v. Keaton*, 3 Cald. (Tenn.) 8; *Gooding v. Morgan*, 70 Ill. 275; *Papin v. Ryan*, 32 Mo. 21; *Semple v. Hagar*, 27 Cal. 163; *Buchanan v. Whitham*, 36 Ind. 257; *Bird v. State*, 21 Gratt. (Va.) 800; *Mims v. Schwartz*, 37 Tex. 13; *Carson v. Smith*, 5 Minn. 78; *Owings v. Hull*, 9 Peters 607; *Railroad Co. v. Bank of Ashland*, 12 Wall. 226; *Jasper v. Porter*, 2 McLean (U. S.) 579; 1 Greenl. Ev. sec. 5. As to proof of statutes and foreign laws, see sec. 513 *et seq. infra*.

2, *The Scotia*, 14 Wall. 170, laws of navigation as to carrying lights.

3, Art. 6 U. S. Const; *Hauenstein v. Lynham*, 100 U. S. 483; *Ware v. Hylton*, 3 Dall. 199.

4, *Montgomery v. Deeley*, 3 Wis. 709; *Godfrey v. Godfrey*, 17 Ind. 6; 79 Am. Dec. 448; *Carson v. Smith*, 5 Minn.

78; *Dale v. Wilson*, 16 Minn. 525; *Howard v. Moot*, 64 N. Y. 262; *United States v. Reynes*, 9 How. 127; *Lacroix Fils v. Sarrazin*, 15 Fed. Rep. 489.

5, *Lacroix Fils v. Sarrazin*, 15 Fed. Rep. 489.

6, *People v. Snyder*, 41 N. Y. 397; *Howard v. Moot*, 64 N. Y. 271.

7, *Carson v. Smith*, 5 Minn. 78, 88.

§ 113. **Acts of congress — Constitutions — Statutes of the state.**—The acts of congress prove themselves both in the federal and state courts. The following are illustrations of the application of the rule to different statutes: Acts conferring claims to lands,¹ for the survey and disposal of public lands,² for the adjudication of private land claims,³ the bankrupt law and its operation,⁴ internal revenue laws⁵ and acts in relation to the District of Columbia.⁶ The constitution of the United States and that of the state with their amendments are the fundamental law to which all statutes must conform. Necessarily the courts must constantly take cognizance of the federal and state constitutions under which they are organized.⁷ On the same general principle all courts, whether state or federal, are bound to take notice of the public statutes of the state wherein they are held.⁸ There is no rule of evidence better established than this; and differences of opinion have arisen, not in respect to the rule itself, but in determining what are public statutes within its meaning.

1, *Papin v. Ryan*, 32 Mo. 21; *Temple v. Hogan*, 27 Cal. 163. See note, 20 L. R. A. 382.

2, *Dickenson v. Breeden*, 30 Ill. 279; *Buchanan v. Whitant*, 36 Ind. 257.

3, *Semple v. Hagar*, 27 Cal. 163.

4, *Morris v. Davidson*, 47 Ga. 361; *Mims v. Schwartz*, 37 Tex. 13.

5, *Kessel v. Alberts*, 56 Barb. (N. Y.) 362.

6, *Bayly's Adm. v. Chubb*, 16 Gratt. (Va.) 284.

7, *Graves v. Keaton*, 3 Cold. (Tenn.) 8; *De Chastellux v. Fairchild*, 15 Pa. 18.

8, *Western & A. Ry. Co. v. Roberson*, 61 Fed. Rep. 592; *Loree v. Abner*, 57 Fed. Rep. 159; *Merchants Bank v. McGraw*, 59 Fed. Rep. 972; *People v. Herkimer*, 4 Cow. 345; *Horn v. Chicago Ry. Co.*, 38 Wis. 463; 1 Greenl. Ev. sec. 6; 1 Whart. Ev. sec. 286. The court having knowledge of public statutes may even disregard the allegation in a pleading in respect thereto, *State v. Jarrett*, 17 Md. 309. See note, 89 Am. Dec. 665.

§ 114. **What are public statutes.**—It is clear that statutes are public within the meaning of the rule just stated, although local in their character, where they contain an express provision that they are public. As a matter of convenience legislatures frequently insert in a statute a provision of this character and thus formal proof of the statute may be dispensed with,¹ as when such a provision was contained in an act incorporating the owners of certain lands for private purposes.² The same rule applies when the law of the state requires all statutes to be judicially noticed.³ There is some difficulty in

laying down a general rule by which the question may in all cases be determined, from the nature of the subject matter of the act. Provisions in statutes may lie very close to the border line between those which are public and those which are private in their nature. Again the same statute may contain provisions limited in their effect to a few persons or to a class and other provisions which may affect a greater number. Public statutes are frequently spoken of in this connection as synonymous with general statutes and they were originally described as those which "relate to the kingdom at large."⁴ Clearly they do not include those mere private acts which affect only a few individuals and which are in the nature of a contract between the state and the beneficiaries.⁵ Acts have been declared public if they "*extend to all persons within the territorial limits* described in the statute."⁶ Mr. Sedgwick defines them as "those that relate to or bind all within the jurisdiction of the law making power, limited as that power may be in its territorial operation or by constitutional restraints."⁷ This definition is broad enough to include those acts which are designed to affect primarily some locality or class and yet which contain provisions that may affect the entire community or state.⁸ On this principle the courts have taken judicial notice of statutes increasing the jurisdiction of a given county court,⁹

establishing or changing a county seat,¹⁰ regulating the sale of liquor in a given place,¹¹ fixing or changing the boundaries of a city or county,¹² prohibiting fishing within given limits,¹³ regulating the lumber traffic within a stated district¹⁴ and making it felony to steal the note of a particular bank.¹⁵ In a recent case the federal supreme court quotes approvingly from an Indiana case¹⁶ as follows: "Statutes incorporating counties, fixing their boundaries, establishing court-houses, canals, turnpikes, railroads, etc., for public uses, all operate upon local subjects. They are not for that reason special or private acts." The court then adds: "In this country the disposition has been on the whole to enlarge the limits of this class of public acts and to bring within it all enactments of a general character or which in any way affect the community at large."¹⁶ It may be fairly inferred from the illustrations already given that the public or private character of an act is determined not so much by the extent of territory as by the number of people it may affect.¹⁷

1, Clark v. Janesville, 10 Wis. 182; Bowie v. Kansas, 51 Mo. 454; Hammond v. Tulver, 4 Md. 138.

2, Beaty v. Knowler's Lessee, 4 Peters 164.

3, Junction Ry. Co. v. Bank of Ashland, 12 Wall. 226.

4, Clark v. Janesville, 10 Wis. 178; Mills v. Gleason, 11 Wis. 470.

5, Leland v. Wilkinson, 6 Peters 317; Bank v. Gruber, 87 Pa. St. 468.

- 6, *Levy v. State*, 6 Ind. 284.
- 7, *Sedg. Stat.* 30.
- 8, *Bevens v. Baxter*, 23 Ark. 387; *Bretz v. Mayor*, 6 Rob. (N. Y.) 325; 9 *Burnham v. Webster*, 5 Mass. 266.
- 9, *Meshke v. VanDoren*, 16 Wis. 319.
- 10, *State ex rel. Cothren v. Lean*, 9 Wis. 279.
- 11, *Levy v. State*, 6 Ind. 281.
- 12, *Com. v. Springfield*, 7 Mass. 12; *State v. Jackson*, 39 Me. 291.
- 13, *Burnham v. Webster*, 5 Mass. 266.
- 14, *Pierce v. Kimball*, 9 Me. 54.
- 15, *United States v. Porte*, 1 Cranch C. C. 369.
- 16, *Unity v. Bunage*, 103 U. S. 447; *West v. Blake*, 4 Blatchf. (U. S.) 234.
- 17, *State ex rel. Cothren v. Lean*, 9 Wis. 279; *Clark v. Janesville*, 10 Wis. 136; see cases already cited. See note, 89 Am. Dec. 665-667.

§115. Bank and railway charters.—Although banks and railroad companies are corporations organized for private gain, their charters generally contain provisions which directly or indirectly affect the entire community; such charters are by the weight of authority public acts of which the courts take judicial cognizance.¹ However, in some of the cases holding this rule the statute in question was by its terms declared to be public.² The contrary rule has been maintained in other cases.³ For obvious reasons courts do not take judicial notice of *private corporations* organized under general laws; and it may be remarked that under the modern constitutional prohi-

bitions against special legislation the distinction between public and special or private acts is becoming of less importance.

1, *Bank of Newberry v. Railroad Co.*, 9 Rich. L. (S. C.) 495; *Shaw v. State*, 3 Sneed (Tenn.) 86; *Davis v. Bank of Fulton*, 31 Ga. 69; *Bank of Utica v. Smedes*, 3 Cow 684; *Buell v. Warner*, 33 Vt. 570; *Jones v. Fales*, 4 Mass. 245; *Jackson v. State*, 72 Ga. 28; *Hall v. Brown*, 58 N. H. 93; *Danville Company v. State*, 16 Ind. 456; *Smith v. Strong*, 2 Hill 241; *Bank of Commonwealth v. Spelman*, 3 Dana (Ky.) 150.

2, See cases last cited.

3, *First National Bank v. Gruber*, 87 Pa. St. 468; 30 Am. Rep. 378; *Mandie v. Bousignore Savings Bank*, 28 La. An. 415; *Perry v. Railroad Co.*, 55 Ala. 413; *Atchison, T. & S. F. Railway v. Blackshire*, 10 Kan. 477.

§ 116. **Municipal charters.**—Acts incorporating cities, villages and other municipal corporations may be regarded as inherently public or, if local in their general character, as containing certain provisions which may affect the general public. Whatever may be the grounds of the rule the courts have generally taken judicial notice of such acts whether declared to be public or not.¹ Hence the corporate existence or powers of such bodies need not be alleged nor proved; for example, the power to improve streets, to sue and be sued and to pass ordinances and by-laws.² Nor need the repeal of such acts be proved³ or that of supplementary or amendatory acts.⁴ But the fact that a city or other community has become incorporated by *performing the*

conditions prescribed by a general law must be proved. It is not the duty of courts to take judicial notice of the execution of statutes; the various modes by which statutes are carried into effect by the executive government or others are mere facts and must be proved as such.⁵

1, French v. Barre, 58 Vt. 567; Smith v. Janesville, 52 Wis. 680; Stier v. City of Oskaloosa, 41 Iowa 353; Castello v. Landwehr, 28 Wis. 522; City of Janesville v. Railway Co., 7 Wis. 484; Hooker v. Greene, 50 Wis. 271; Beasley v. Town of Beckley, 28 W. Va. 81; Alexander v. Milwaukee, 16 Wis. 247; Terry v. Milwaukee, 15 Wis. 490; Case v. Mobile, 30 Ala. 538; Village of Winooske v. Gokey, 49 Vt. 282; Prell v. McDonald, 7 Kan. 426; State v. Murfreesboro, 11 Humph. (Tenn.) 217; 1 Dill. Mun. Corp. sec. 83. But see Town of Butler v. Robinson, 75 Mo. 192; Bowie v. Kansas City, 51 Mo. 454; Aftiz v. Missouri Pac. Ry. Co., 17 Mo. App. 419; Wisdom v. Wabash, St. Louis Ry., 19 Mo. App. 324; Hard v. City of Decorah, 43 Iowa 313; People v. Potter, 35 Cal. 110; Swails v. State, 4 Ind. 516; Vance v. Mechanics' Bank, 1 Blackf. (Ind.) 79; 1 Greenl. Ev. sec. 479, 480.

2, Smith v. Janesville, 52 Wis. 680; State v. Sherman, 42 Mo. 210; Janesville v. Milwaukee Ry. Co., 7 Wis. 484; Payne v. Treadwell, 16 Cal. 221; Case v. Mobile, 30 Ala. 538; Macey v. Titcomb, 19 Ind. 135.

3, Belmont v. Morrill, 69 Me. 314.

4, Newark Bank v. Assessors, 30 N. J. L. 13; Unity v. Burrage, 103 U. S. 447.

5, State v. Cleveland, 80 Mo. 108; Johnson v. Common Council, 16 Ind. 227; Temple v. State, 15 Tex. App. 304; 49 Am. Rep. 200 and long note; Canal Co. v. Railway Co., 4 Gill and J. (Md) 1. If, however, it appear from the record that a municipality has exercised corporate powers under a general law the court may take notice of its organization, Doyle v. Bradford, 90 Ill. 416.

§ 117. Ordinances and other acts of municipal bodies.—It is sufficiently burdensome upon the court to be required to take cognizance of all acts creating municipal corporations and their powers. They have uniformly refused to take cognizance of the acts and ordinances of such bodies or of the time when such ordinances take effect, except upon due proof.¹ Such for example as ordinances establishing streets,² the acts of county boards,³ regulations of a canal board⁴ and acts of a county in adopting township organization.⁵ In a Wisconsin case a village charter provided that all courts must take judicial notice of the ordinances of the village. Although the decision was rendered on other grounds, Judge Dixon thus expressed his views of the act: "It is difficult to perceive how the legislature can thrust knowledge into the heads of the judges in this way or what good can come of the enactment unless parties interested bring the ordinances or copies of them into court and put them in evidence in the usual way."⁶ The rule as to ordinances is subject to the qualification that a *municipal court* may take judicial notice of the ordinances of the municipality;⁷ and on appeal therefrom it has been held that the *appellate court* is governed by the same rule as the municipal court.⁸ But if statutes, purely private or of another state, or municipal ordinances are *incorporated into a public statute of*

the state or act of congress they thereby become public and subjects of judicial notice.⁹

1, Garvin v. Wells, 8 Iowa 286; New Orleans v. Labett, 33 La. An. 107; Lucker v. Com., 4 Bush (Ky.) 440; Mooney v. Kennet, 19 Mo. 551; Wilson v. State, 16 Tex. App. 497. As to proof of the statutes of the state, see sec. 513 *infra*.

2, Porter v. Waring, 69 N. Y. 251.

3, Indianapolis Ry. Co. v. Caldwell, 9 Ind. 397.

4, Palmer v. Aldridge, 16 Barb. 131.

5, State v. Cleveland, 80 Mo. 108; Johnson v. Common Council, 16 Ind. 227.

6, Pettit v. May 34 Wis. 674; Cox v. City of St. Louis, 11 Mo. 431.

7, State v. Leiber, 11 Iowa 407; Downing v. Miltonville, 36 Kan. 740.

8, Clare v. State, 5 Iowa 509.

9, Flanigan v. Washington Ins. Co., 7 Barr (Pa.) 306; Canal Co. v. Railroad Co., 4 Gill & J. (Md.) 1.

§ 118. **Character and existence of the statute, a question for the court.**—It is the province of the court to determine whether a given act is a public or a private act, as well as whether it has been *legally enacted*. For the latter purpose the powers of courts in this country are much less restricted than in England. When an act of parliament is duly and finally enrolled, such enrollment becomes a record importing absolute verity. No court can question the power of parliament or listen to any impeachment of the record. The only inquiry is, whether such record exists.¹ In this country it is usual

for the state constitutions to prescribe certain modes of procedure in the enactment of statutes; and in such cases, since the constitution is the fundamental law, there must be compliance with the constitutional provision. When the constitution provides for the keeping of legislative journals, such journals constitute a record. Although the laws published by authority are, as a matter of course,² presumed to be correct, yet by the weight of authority it is held that the court will, if it becomes necessary, take judicial cognizance of such journals for the purpose of ascertaining whether the statute has been enacted in the mode prescribed by the constitution. According to this view the due *authentication and enrollment* of the statute affords only *prima facie* evidence of its passage, which may be overcome by examination of the legislative journals.³ But there is a series of decisions based on somewhat different constitutional provisions which maintain that the court cannot go behind the enrollment which is authenticated by the proper officers of state.⁴ Although it is proper for the parties to call the attention of the court to the legislative journals when the inquiry as to the existence of the statute arises, this is not necessary; nor is it necessary to form any *issue* on such question, for the question of the existence of a statute is a judicial one, of which the court will take notice.⁵ Although the courts will

take notice of the *contents of the journals* of the two houses of the legislature far enough to determine whether an act published as a law was actually passed in accordance with the requirements of the constitution, they will go no further; when it appears that an act has been so passed no inquiry will be permitted to ascertain whether the two houses have or have not complied strictly with their own rules in their procedure on the bill, intermediate its introduction and final passage.⁶

Mr. Justice Miller thus summed up the rule:

"On principle as well as authority whenever a question arises in a court of law of the existence of a statute or of the time when a statute took effect or of the precise terms of a statute, the judges who are called upon to decide it have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such question; always seeking first for that which in its nature is most appropriate unless the positive law has enacted a different rule."⁷ In a recent case, which attracted wide attention, the supreme court of the United States held that the signing of an enrolled bill by the speaker of the house of representatives and by the president of the senate, in open session, is an official attestation by the two houses of such bill, as one that has passed congress; and when the bill thus attested receives the approval of the

president and is deposited in the department of state according to law, its authentication as a bill that has passed congress is complete and unimpeachable. It is not competent to show from the journals of either house of congress that an act so authenticated, approved and deposited did not pass in the precise form in which it was signed by the presiding officers of the two houses and approved by the president.⁸ The court will take judicial notice of the statutes and laws of the state although they are in conflict with the allegations of the pleadings,⁹ as well as of the fact that statutes are repealed or suspended and of the time of such repeal.¹⁰ Accordingly those are not facts on which issue can properly be joined.¹¹

1, *The Prince's Case*, 4 Coke 145-194.

2, *Opinions of the Justices*, 52 N. H. 622; *State v. Francis*, 26 Kan. 724; *State v. McLelland*, 18 Neb. 236; *People v. Briggs*, 50 N. Y. 553; *Williams v. State*, 6 Lea (Tenn.) 549; *Miller v. State*, 3 Ohio St. 476; *Supervisors v. People*, 25 Ill. 181; *Perry Co. v. Railroad Co.*, 58 Ala. 546; *Bound v. Wisconsin Cent. Ry. Co.*, 45 Wis. 543; *People v. Loewenthal*, 93 Ill. 191; *Speer v. Plank Road Co.*, 22 Pa. St. 376; *Wise v. Bigger*, 79 Va. 269.

3, See cases last cited; also *Bowen v. Missouri Pac. Ry. Co.*, 118 Mo. 541; *Somers v. State*, (S. Dak.) 58 N. W. Rep. 804.

4, *Bender v. State*, 53 Ind. 254; *People v. Devlin*, 33 N. Y. 269; *People v. Commissioners*, 54 N. Y. 276; *Green v. Weller*, 32 Miss. 690; *State Lottery Co. v. Richoux*, 23 La. An. 743; 8 Am. Rep. 602; *Pacific Ry. Co. v. The Governor*, 23 Mo. 353.

5, *Larrison v. Railroad Co.*, 77 Ill. 11; *Post v. Supervisors*, 105 U. S. 667; *People v. Supervisors*, 8 N. Y. 317; *Gardner v. Collector*, 6 Wall. 499. Although it has been held that legislative journals should in such cases, like other records, be proved as evidence, *Grob v. Cushman*, 45 Ill. 119.

6, *McDonald v. State*, 80 Wis. 407.

7, *Gardner v. Collector*, 6 Wall. 499.

8, *Field v. Clark*, 143 U. S. 649. In the report of this case is given a valuable list of the authorities upon the question whether legislative journals can be used to impeach the completely enrolled act duly recorded and authenticated. See also *United States v. Ballin*, 144 U. S. 1.

9, *State v. Jarrett*, 17 Md. 309.

10, *Inhabitants of Springfield v. Worcester*, 2 Cush. 52; *State v. O'Connor*, 13 La. An. 486; *East Tenn. Iron Co. v. Gaskell*, 2 Lea (Tenn.) 742.

11, *Smith v. Janesville*, 52 Wis. 680.

§ 119. Private statutes — Statutes of sister states.—From the preceding discussion and authorities it is evident that, in the absence of statutory provisions, mere private statutes must be proved by appropriate evidence like other facts. They relate to only a limited number of persons and are not matters of such notoriety as to be presumed to be within the knowledge of the court.¹ In some states statutes have been enacted changing the rule in such manner that private as well as public statutes must be judicially noticed.² The relations of the several states are those of foreign states in close friendship; and although the courts are presumed to be

cognizant of the domestic statutes, there is no such rule as to the statutes of foreign countries or those of *sister states*. Hence if a litigant desires to avail himself of any other statutes or laws than those which govern in the state of the forum he must be prepared to prove the same.³ For example, the laws of interest and usury at the place of contract,⁴ the statutes as to the distribution of estates⁵ or as to the estates of insolvents,⁶ the liability of stockholders⁷ and the statute under which a foreign corporation is chartered⁸ must be proved.

1, *Leland v. Wilkinson*, 6 Peters 317; *Horn v. Chicago & N. W. Ry. Co.*, 38 Wis. 463; *Portsmouth Livery Co. v. Watson*, 10 Mass. 91; *Perdicaris v. Trenton, etc. Co.*, 29 N. J. L. 367; *Legrand v. Hampton-Sidney College*, 5 Munf. (Va.) 324; *Broad Street Hotel Co. v. Weaver*, 57 Ala. 26; *Atchison Ry. Co. v. Blackshier*, 10 Kan. 477; *Hailes v. State*, 9 Tex. App. 170; *Workingmen's Bank v. Converse*, 33 La. An. 963.

2, *Collier v. Baptist Society*, 8 B. Mon. (Ky.) 68; *Durham v. Daniels*, 2 G. Greene (Iowa) 518; *State v. McAllister*, 24 Me. 139; *Hart v. Baltimore Ry. Co.*, 6 W. Va. 336; *Paine v. Schenectady Ins. Co.*, 11 R. I. 411; *Ohio v. Hinchman*, 27 Pa. St. 479; *People v. Hagar*, 52 Cal. 171. As to mode of proving statutes, see sec. 513 *et seq. infra*. See also extended note, 21 L. R. A. 467.

3, *Hilliard v. Outlaw*, 92 N. C. 266; *Shed v. Augustine*, 14 Kan. 282; *Hunt v. Johnson*, 44 N. Y. 27; 4 Am. Rep. 631; *State v. Maylooke*, 7 Ore. 54; *Nesse v. Farmers Ins. Co.*, 55 Iowa 604; *Chapman v. Colby*, 47 Mich. 46; *Syme v. Stewart*, 17 La. An. 73; *Hoyt v. McNeil*, 13 Minn. 390; *Rape v. Heaton*, 9 Wis. 328; *Chumasero v. Gilbert*, 24 Ill. 293; *Palfrey v. Portland Ry. Co.*, 4 Allen 55; *Irving v. McLain*, 4 Blatchf. (U. S.) 52; *Chouteau v. Pierre*, 9 Mo. 3;

Hale v. New Jersey Nav. Co., 15 Conn. 539; 39 Am. Dec. 398; Bufford v. Holliman, 10 Tex. 560; 60 Am. Dec. 223; Pelton v. Platner, 13 Ohio 209; 42 Am. Dec. 197; Phillip v. Gregg, 10 Watts (Pa.) 158; 36 Am. Dec. 158; Owen v. Boyle, 15 Me. 147; 32 Am. Dec. 143; McDaniel v. Wright, 7 J. J. Marsh. (Ky.) 475. See articles on "Proof of Foreign Laws in English Courts," 91 Law Times 425; 92 *id.* 22, 58.

4, Hosford v. Nichols, 1 Paige (N. Y.) 220; Ramsay v. McCauley, 2 Tex. 189; Holley v. Holley, Litt. Sel. Cas. (Ky.) 505; 12 Am. Dec. 342; Campion v. Kille, 15 N. J. Eq. 476; Billingsley v. Dean, 11 Ind. 231.

5, McDaniel v. Wright, 7 J. J. Marsh. (Ky.) 475.

6, Mobile Ry. Co. v. Whitney, 39 Ala. 468.

7, Eastman v. Crosby, 8 Allen 206.

8, Portsmouth Livery Co. v. Watson, 10 Mass. 91.

§120. Same—Exceptions to the rule.

The general rule requiring proof of the law of a sister state or of a foreign country is subject to the qualification that the courts of any state are deemed to know the law which prevailed in the state or country, to which its territory formerly belonged, prior to and at the time of the separation. Thus the laws and customs prevailing in Louisiana prior to the cession to the United States have been judicially noticed;¹ and the courts of Kentucky have noticed judicially the former laws of Virginia.² So if the laws of one state recognize official acts done in pursuance of the laws of another state, the courts of the former state may likewise take judicial notice of such laws in passing upon the validity

of such acts.³ In determining the validity of judgments rendered in a sister state it has been held that the courts will take notice that the constitution of such state creates courts having general and appellate jurisdiction.⁴ And in a Wisconsin case it was held that the courts might without proof take judicial notice that the circuit courts of the several states are courts of general jurisdiction.⁵

1, *United States v. Turner*, 11 How. 663; *Chouteau v. Pierre*, 9 Mo. 3; *Ott v. Soulard*, 9 Mo. 581; *United States v. Perot*, 98 U. S. 428. As to the mode of proving statutes of sister states, sec. 516 *infra*.

2, *Holley v. Holley*, Litt. Sel. Cas. (Ky.) 505; 12 Am. Dec. 342.

3, *Graham v. Williams*, 21 La. An. 594; *Carpenter v. Dexter*, 8 Wall. 513.

4, *Butcher v. Brownsville*, 2 Kan. 70; *Dodge v. Coffin*, 15 Kan. 277.

5, *Jarvis v. Robinson*, 21 Wis. 523. It was even held in Pennsylvania and Rhode Island that the courts would take notice of the local laws of the state from which the records came, *Paine v. Schenectady Ins. Co.*, 11 R. I. 441; *State v. Hinchman*, 27 Pa. St. 479. But see 116 U. S. 1, where these cases are criticised.

§ 121. **Federal courts — State statutes.** The judges of the federal courts like those of the state courts recognize the distinction between public and private statutes.¹ But the federal courts are not created by congress merely for the purpose of administering the local laws of a single state; and they are

bound to take notice of the public acts of the various states of the Union. In this forum the laws of every state are presumed to be known to the court.² If by the statute or constitutional provision in any state the courts are required to take notice of private statutes, the United States courts sitting within that state will do the same.³ In the exercise of its general appellate jurisdiction the supreme court of the United States takes judicial notice of the laws of every state; but a different rule governs in a writ of error to the highest court of a state. In that case the United States supreme court does not take notice of such laws unless made a part of the record sent up for revision.⁴ Since the supreme court of the United States takes judicial notice of the laws of the several states, it becomes necessary for that court to take cognizance of the judicial decisions of the courts of last resort in such states; and it is a familiar rule that the supreme court will, as a general rule, *follow the construction* placed upon the statute of the state by the supreme court of that state.⁵ The federal courts will also take judicial notice of such federal matters of general public importance as the rules and regulations prescribed by the interior department in respect to contests before the land office, although they are not public statutes within the strict meaning of the term;⁶

but state courts do not uniformly take judicial notice of such rules and regulations.¹

1, *Covington Drawbridge Co. v. Shephard*, 20 How. 227.

2, *Swann v. Swann*, 21 Fed. Rep. 299; *Gormley v. Bunyan*, 138 U. S. 623; *Elwood v. Flannigan*, 104 U. S. 562; *Owings v. Hull*, 9 Peters 607; *Beaty v. Knowles*, 4 Peters 152; *Mewster v. Spalding*, 6 McLean (U. S.) 24; *Nelson v. Foster*, 5 Biss. (U. S.) 44; *Jasper v. Porter*, 2 McLean (U. S.) 579.

3, *Hanley v. Donoghue*, 116 U. S. 1; *Junction Ry. Co. v. Bank of Ashland*, 12 Wall. 226; *Merrill v. Dawson*, 1 Hemp. 563; *Case v. Kelly*, 133 U. S. 21.

4, *Gormley v. Bunyan*, 138 U. S. 623; *Jasper v. Porter*, 2 McLean (U. S.) 579; *Smith v. Tallapoosa*, 2 Wood. 574.

5, *Hanley v. Donoghue*, 116 U. S. 1; *Renaud v. Abbott*, 116 U. S. 277. The same rule prevails although no reference was made to the statute in the court below, *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747; *Elmendorf v. Taylor*, 10 Wheat. 152; *Christy v. Pridgeon*, 4 Wall. 196; *Flash v. Conn*, 109 U. S. 379.

6, *Caha v. United States*, 152 U. S. 211.

7, *Hensley v. Tarpey*, 7 Cal. 288. But see *United States v. Williams*, 6 Mont. 379.

§ 122. The unwritten law.—The rule as to judicial notice applies to the unwritten as well as the written law. Our courts take notice that the system of the common law prevailed in England on our separation from that country; they treat the common law, not as the law of a foreign country, but as our own law and as a system which may be adapted to any condition of things, however new, which may arise.¹ “Notice of domestic law involves notice of all the systems of ju-

risprudence by which such domestic law is limited or otherwise affected. Hence a court is bound to take notice of such subsidiary codes or systems of law as may enter into the law by which it is governed. In submission to this principle judicial notice will be taken by common law courts of equity practice when this is distinct from the common law."² It is under this rule that the customs and rules of the *law merchant* and those other *customs* and usages which prevail throughout the country and have become the law are to be determined by the court and without proof.³ So the courts take judicial notice of the *ecclesiastical law* of christendom as part of the common law,⁴ but they do not notice the statutes of England enacted since the revolution.⁵ It will be seen in another section that if a party desires to have the court take cognizance of the *unwritten law of another state* he should prove such law like any other fact. In a case recently decided in Kansas it was held that the courts of that state may take judicial knowledge of the common law within the state; also of what the common law would be but for the state statutes and the unwritten law, and that for such purpose they may take judicial notice of all the decisions of courts in this country and in all other countries which have adopted the common law of England. But it was held in conformity to the general rule that if a party is to avail himself of the

common law of another state he must prove it.⁶ There are certain executive *proclamations* and decrees which are of as public a character as legislative acts and which, by reason of their notoriety, will be judicially noticed. Thus such notice was taken of the proclamation of President Lincoln granting full amnesty and pardon for the offense of treason to all persons who participated in the rebellion against the United States.⁷ Other illustrations are proclamations of peace or war,⁸ the fact whether or not the president has declared that a certain guano island is within the jurisdiction of the United States,⁹ documents communicated by the president to the senate of the United States,¹⁰ public proclamations of the governor of the state,¹¹ *official reports* of public officers, state and national, relating to the public lands and published by authority of an act of the legislature,¹² proclamations issued by the secretary of state in accordance with acts of congress, executive documents printed by authority of the federal senate.¹³ But the supreme court of the United States refused to take cognizance of the order of a military commander at New Orleans during the Civil War when the record contained no proof thereof.¹⁴

1, Owen v. Boyle, 15 Me. 147; 32 Am. Dec. 143; Ocean Ins. Co. v. Field, 2 Story (U. S.) 69; Stokes v. Macken, 62 Barb. 145; Conger v. Weaver, 6 Cal. 548; Maberley v. Robbins, 5 Taunt. 625; Elliott v. Evans, 3 Bos. & P. 181;

Neeves v. Burroge, 14 Q. B. 504; *Westoby v. Day*, 2 El. & B. 624; 1 Greenl. Ev. sec. 5.

2, Whart. Ev. sec. 296.

3, *Jewell v. Center*, 25 Ala. 498; *Reed v. Wilson*, 41 N. J. L. 29; *Fleming v. McClure*, 1 Brev. (S. C.) 428; 2 Am. Dec. 671; *Owen v. Boyle*, 15 Me. 147; 32 Am. Dec. 143.

4, 1 Greenl. Ev. sec. 5.

5, *Spaulding v. Chicago Ry. Co.*, 30 Wis. 110; *Ocean Ins. Co. v. Field*, 2 Story (U. S.) 59; *Cooley Const. Lim.* 36.

6, *St. Louis Ry. Co. v. Weaver*, 35 Kan. 412. As to mode of proof of laws of sister states, see sec. 516 *et seq. infra*.

7, *Armstrong v. United States*, 13 Wall. 154.

8, *Dodder v. Huntingfield*, 11 Ves. 292.

9, *Jones v. United States*, 137 U. S. 202.

10, *Whiton v. Albany Ins. Co.*, 109 Mass. 24.

11, *Dunning v. New Albany Ry. Co.*, 2 Ind. 437.

12, *Kirby v. Lewis*, 39 Fed. Rep. 66.

13, *Whiton v. Albany Ins. Co.*, 109 Mass. 24.

14, *Burke v. Miltenberger*, 19 Wall. 519. But see *New Orleans Canal Co. v. Templeton*, 20 La. An. 141.

§ 123. **Customs.**—Among the customs of which judicial notice has been taken may be mentioned the following: That of observing certain days, such as Sundays and great festivals;¹ the lien of bankers on deposits and the mode of withdrawing deposits;² the custom of merchants in relation to protests and notice of non-payment of bills of exchange;³ their custom of charging interest on their ac-

counts after six months;⁴ that of drawing bills of lading in sets;⁵ the law of the road and that of navigation as applied to the meeting of vessels.⁶ But *particular or local* customs must be proved.⁷ Other illustrations of the judicial notice of the customary modes of carrying on business will be found under another head.⁸

1, Sasser v. Farmers' Bank, 4 Md. 409.

2, Brandao v. Barnett, 12 Clark & F. 787; Munn v. Burch, 25 Ill. 35.

3, Fleming v. McClure, 1 Brev. (S. C.) 428; 2 Am. Dec. 671.

4, Watt v. Hoch, 25 Pa. St. 411.

5, Tayl. Ev. sec. 5.

6, Tayl. Ev. sec. 5.

7, Horn v. Chicago & N. W. Ry. Co., 38 Wis. 463; Railway Co. v. Wood, 74 Ala. 449; Young v. Ransom, 31 Barb. 49, customs of Protestant Episcopal church; Lewis v. McClure, 8 Ore. 273, customs of mining camps; Turner v. Fish, 28 Miss. 306, of an indian tribe; Johnson v. Robertson, 31 Md. 476, usages of the printer's trade; Railroad Co. v. Wood, 74 Ala. 499, amount of grain contained by a railroad car.

8, See sec. 133 *infra*.

§ 124. Courts — Officers of the court — Records — Terms.— There is a large class of facts of which courts take judicial notice not merely by reason of their general notoriety, but because they are of such a character that presiding judges have peculiar means of knowledge with respect to them. Stated in

general terms these facts are such as relate to the organization, terms, rules of practice, records and officers of the courts themselves. To illustrate the subject more fully, judges are presumed to know the records and officers of their own courts and their signatures,¹ including the *attorneys* and their *signatures* to admissions of service and pleadings used in the cause.² Where attorneys have appeared in a case and there has been no withdrawal of the appearance the court will know judicially who have so appeared.³ But such recognition does not extend beyond professional acts as attorneys; nor does it extend to the signature of a party to the cause.⁴ In like manner the courts take judicial notice of the judges of the other courts of record within the state and of the seals of such courts; in each United States circuit and district court the seal and clerk's certificate of every other such court are so recognized.⁵ The courts of every state exist by virtue of public laws by which they are created; and on familiar principles the courts must take notice of such laws and of the *jurisdiction* which they confer.⁶ On the same general principle courts take notice of their own *rules* and *mode of practice* and also of the rules and mode of practice of other courts of record within the state.⁷ But an appellate court does not take such notice of the rules of practice in the inferior courts, unless such rules are prescribed

by general law or unless justice requires it in the revision of the judgments of such courts.⁸ The *terms of courts* are generally prescribed by general laws and for this, if for no other reason, are judicially known to the courts of the jurisdiction.⁹ Thus the appellate court has taken notice of the day of the month and week on which a specified day of the term fell;¹⁰ that the day on which judgment was taken was or was not a day of a term;¹¹ that the judge of the lower court has resigned,¹² and that, if a crime was committed at night and the trial was had the next day, the court could not have been in session for the finding of an indictment.¹³ The court in which a cause is pending will take judicial notice of all *its own records* in such cause and of the proceedings in the court relating thereto.¹⁴ Thus an order¹⁵ or a judgment¹⁶ in the same cause entered upon the minutes need not be proved. Nor need it be proved that a motion has been made when the facts lie within the knowledge of the judge;¹⁷ nor that there has been a former trial or verdict.¹⁸ But in a given case the court is not held to have judicial knowledge of the pendency of *proceedings in other causes* in the same court, much less of those in other courts,¹⁹ for example, that there has been a former adjudication;²⁰ nor does the court take notice of the contents of a record in another action then pending;²¹ nor that the pending case

has connection with another formerly decided by the court;²² nor that in another action there has been a conviction or an acquittal;²³ nor that another action is pending involving similar questions;²⁴ nor, for obvious reasons, will a state court take notice of proceedings in a federal court.²⁵

1, *Alderson v. Bell*, 9 Cal. 315; *State v. Cole*, 9 Hump. (Tenn.) 626; *Major v. State*, 2 Sneed (Tenn.) 1; *Grace v. Ballou*, 4 S. Dak. 333; *Hollenbach v. Schnabel*, 101 Cal. 312; *Searls v. Knapp*, (S. Dak.) 58 N. W. Rep. 807. But not of the officers of other courts, see 89 Am. Dec. 683.

2, *Ripley v. Burgess*, 2 Hill 360; *People v. Nevins*, 1 Hill 154.

3, *Symes v. Major*, 21 Ind. 443.

4, *Masterson v. LeClaire*, 4 Minn. 163; *Alderson v. Bell*, 9 Cal. 315,

5, *Turnbull v. Payson*, 95 U. S. 418; *Mewster v. Spalding*, 6 McLean (U. S.) 24; *Wornack v. Deannan*, 7 Port. (Ala.) 513, *Matter of Keeler*, Hemp. (U. S.) 306, holding that United States court cannot take judicial notice of justices of the peace of another state. The supreme court of Vermont took judicial notice of what judges are presiding over subordinate courts created by the constitution at a given time, *Hancock v. Town of Worcester*, 62 Vt. 106.

6, *Tucker v. State*, 11 Md. 322; *Ellsworth v. Moors*, 5 Iowa 486; *Ex parte Peterson*, 37 Ala. 74; *Kilpatrick v. Com.*, 31 Pa. St. 198.

7, *Coutee v. Pratt*, 9 Md. 67; *Newell v. Newton*, 10 Pick. 470.

8, *Cherry v. Baker*, 17 Md. 75; *Scott v. Scott*, 17 Md. 78; *Cutler v. Caruthers*, 48 Cal. 178; *March v. Com.*, 12 B. Mon. (Ky.) 25.

9, *Davison v. Peticolas*, 34 Tex. 27; *Spencer v. Curtis*, 57 Ind. 221; *Buckinghouse v. Gregg*, 19 Ind. 401; *Morgan v. State*, 12 Ind. 448; *State v. Hammeth*, 7 Ark. 492; *Lindsay*

v. Williams, 17 Ala. 229; Pugh v. State, 2 Head (Tenn.) 227.

10, Lewis v. Wintrode, 76 Ind. 13; Rodgers v. State, 50 Ala. 102; Simms v. Todd, 72 Mo. 288.

11, Bethmy v. Hale, 45 Ala. 522.

12, People v. McConnell, 155 Ill. 192.

13, McGinnis v. State, 24 Ind. 500. The supreme court of Ohio refused to take notice of the duration of a particular session, Gilliland v. Sellers, 2 Ohio St. 223.

14, Brucker v. State, 19 Wis. 539; State v. Bowen, 16 Kan. 475; Robinson v. Brown, 82 Ill. 279.

15, Pagett v. Curtis, 15 La. An. 451. But orders which do not properly belong to the record must be proved, Dines v. People, 39 Ill. App. 565.

16, Farrar v. Bates, 55 Tex. 193.

17, Secrist v. Petty, 109 Ill. 188.

18, State v. Bowen, 16 Kan. 475.

19, Eyster v. Gaff, 91 U. S. 521; National Bank of Monticello v. Bryant, 13 Bush (Ky.) 419; People v. DeLaGuerra, 24 Cal. 73; McCormick v. Herndon, 67 Wis. 648.

20, McCormick v. Herndon, 67 Wis. 648.

21, Adler v. Lang, 26 Mo. App. 226; Enix v. Miller, 54 Iowa 557; Baker v. Mygatt, 14 Iowa 131.

22, Banks v. Burnam, 61 Me. 76; Daniel v. Bellamy, 91 N. C. 78.

23, State v. Edwards, 19 Mo. 674.

24, Lake Merced Water Co. v. Cowles, 31 Cal. 215; *In re* Stewart, 78 Iowa 482.

25, Vassaul v. Seitz, 31 Cal. 225; Habe v. Klanberg, 3 Mo. App. 342.

§ 125. **Matters of history.**—No evidence need be offered to prove matters of public history which affect the whole people. In

respect to such matters the court may resort to such documents as may be at hand and as are deemed worthy of confidence.¹ As illustrations of the rule, courts have taken judicial notice of the existence of our Civil War, of the acts of war which led to it and of the general social and financial results which followed it,² of the existence of slavery in Louisiana,³ of the separation of the Methodist Episcopal church of this country into a northern and southern branch in 1844,⁴ of the destruction of slavery in Alabama by act of war in September, 1865,⁵ of the fact that Missouri was not one of the states which joined the Confederate cause,⁶ of Sherman's march to the sea,⁷ of the career of General Fremont⁸ in California and that in 1869 the government of Texas was carried on by military authority under the reconstruction acts.⁹ The courts of Louisiana have judicially noticed military orders issued by the commanding general or military governor while New Orleans was held by United States troops, which affected proceedings in courts of the state.¹⁰ On the same principle courts have taken notice that in December, 1863, particular states were in rebellion;¹¹ the courts of New York have taken judicial notice of the history of the Six Nations as a part of the general history of that state.¹² The foregoing are some of very many illustrations which might be given showing that the courts will take judi-

cial notice of those facts in the history of the country or state which are of such general notoriety that they may be presumed to be generally known. It follows of course that the courts will not take judicial notice of those matters which are too uncertain in their character to have passed into general history or which only concern individuals or local communities.¹³

1, Swinnerton v. Columbia Ins. Co., 37 N. Y. 173; Prize Cases, 2 Black 635-667; Ross v. Anstle, 2 Cal. 183; Lewis v. Harris, 31 Ala. 689; Payne v. Treadwell, 16 Cal. 220; Douthitt v. Stinson, 63 Mo. 268; Williams v. State, 64 Ind. 553; Humphrey v. Burnside, 4 Bush (Ky.) 215. Contra, Gregory v. Baugh, 4 Rand. (Va.) 611; Morris v. Edwards, 1 Ohio 189; Ashley v. Martin, 50 Ala. 537. In McKinnon v. Bliss, 21 N. Y. 206, the court refused to take judicial notice of matters contained in a local history not offered in evidence.

2, Swinnerton v. Columbian Ins. Co., 37 N. Y. 187; Cross v. Sabin, 13 Fed. Rep. 313; Rice v. Shook, 27 Ark. 137; Cuyler v. Fenill, 1 Abb. (U. S.) 169; Killebrew v. Murphy, 3 Heisk. (Tenn.) 546.

3, Jack v. Martin, 12 Wend. 328.

4, Humphrey v. Burnside, 4 Bush (Ky.) 215.

5, Ferdinand v. State, 39 Ala. 706.

6, Douthitt v. Stinson, 63 Mo. 268.

7, Williams v. State, 67 Ga. 260.

8, De Cilis v. United States, 13 Ct. of Cl. 117.

9, Yates v. Johnson County, 36 Tex. 144.

10, Lanfear v. Mestier, 18 La. An. 497; 89 Am. Dec. 658 and note; Taylor v. Graham, 18 La. An. 656.

11, Hill v. Baker, 32 Iowa 302; 7 Am. Rep. 193. The supreme court of the United States has refused to take notice of the orders of the military commanders in occupa

tion of insurgent states, *Burk v. Miltenberger*, 19 Wall. 519. But see 89 Am. Dec. 670, and cases cited above.

12, *Howard v. Moot*, 64 N. Y. 262; *McKinnon v. Bliss*, 21 N. Y. 206.

13, For example, the movements of certain troops and extent of territory occupied by them in Tennessee at a given time, *McDonald v. Kirby*, 3 Heisk. (Tenn.) 607; *Kelly v. Story*, 6 Heisk. (Tenn.) 202; *Bishop v. Jones*, 28 Tex. 294; also facts stated in cyclopedias or dictionaries, not matters of general knowledge, *Kaolatype Engraving Co. v. Hoke*, 30 Fed. Rep. 444.

§ 126. Facts relating to the currency.

The court will take judicial notice that during the Rebellion there was great financial embarrassment in the Confederate States and great difficulty in making safe investments;¹ that the Confederate currency was forced into circulation, and that it became greatly depreciated,² and that contracts were made with reference to this depreciation;³ and more broadly speaking the court will take judicial notice of the different classes of notes and bills and coins in circulation as money at a particular time, and of the meaning of the popular language in reference to such currency,⁴ and of the coins made at the United States mint and of foreign coins made current by law at different times.⁵

1, *Perkins v. Rogers*, 35 Ind. 124; 9 Am. Rep. 639; *Ashley v. Martin*, 50 Ala. 537; *Foscue v. Lyons*, 55 Ala. 440.

2, *Keppel v. Petersburg Ry. Co.*, Chase (U. S.) 167; *Simmons v. Trimbo*, 9 W. Va. 358. But not of the extent

of the depreciation of the currency during the Civil War, *Modawell v. Holmes*, 40 Ala. 391.

3, *Buford v. Tucker*, 44 Ala. 89.

4, *Lampton v. Haggard*, 3 T. B. Mon. (Ky.) 149; *Jones v. Overstreet*, 4 T. B. Mon. (Ky.) 547; *Hart v. State*, 55 Ind. 599; *Lumpkin v. Merrell*, 46 Tex. 51; *United States v. American Gold Coin*, 1 Woolw. (U. S.) 217; *Johnston v. Hedden*, 2 Johns. Cas. 274.

5, *United States v. Burns*, 5 McLean (U. S.) 23. But not of the value of the different forms of currency at a given time, *Feemster v. Ringo*, 5 B. Mon. (Ky.) 336. The value of Canadian currency and rate of interest are not judicially known by courts of the United States, *Kermott v. Ayer*, 11 Mich. 181. Nor is the current rate of exchange between cities known, *Lowe v. Bliss*, 24 Ill. 168; 76 Am. Dec. 742.

§ 127. Geographical features.—"Courts are bound to take judicial notice of the leading geographical features of the country; but the minuteness of such knowledge is inversely proportional to the distance, being much more specific and detailed in regard to the territory over which the court has jurisdiction than with respect to foreign lands or even different states. The courts will be presumed to be acquainted with the great geographical features of the state, such as lakes, rivers and mountains, and with the division of the state into counties, cities and towns and their relative position."¹ In addition to the illustrations already cited in a previous section the courts have taken notice of the navigability and character of large streams,² that the state of Missouri is east of the Rocky Mountains,³ of the location of the falls of the

Ohio river,⁴ of the fact that in Wisconsin the capacity of many navigable streams has been increased for lumbering purposes by a system of dams,⁵ of the distance between the well-known cities of the United States and of the usual rate of speed of railway trains between them,⁶ of the fact that at a given time the region of Pike's Peak was within the territory of Kansas,⁷ of the facilities for travel between points in determining whether due notice has been given for taking a deposition,⁸ of the location and general routes of railroads within the state,⁹ of the fact that several railroads run through a given city,¹⁰ of the usual duration of voyages across the Atlantic,¹¹ of the population of cities and towns according to the authorized census reports¹² and for some purposes of distances between cities in the same¹³ or in different states.¹⁴ Courts will take judicial notice of the local divisions of the state into counties, cities and towns and of the fact that certain cities are in such subdivisions;¹⁵ but they are not bound to take judicial notice of the situation and distances of such divisions from each other;¹⁶ nor that a certain city is in a given county, when two counties are referred to and the pleadings do not show clearly which is intended.¹⁷ Courts will also take notice of the state or territory where they hold their sessions and of the judicial districts within it. If the public surveys have established the distance from its capital

to any such subdivision, the court will take notice of the fact, and if private property be shown to be within that subdivision, its distance from the capital will also be judicially noticed,—notice of the general fact embracing all the facts included in it.

1, Article by H. Campbell Black, 24 Am. Law Reg. 570; Winnipisiogee Lake Co. v. Young, 40 N. H. 420; Hinckley v. Beckwith, 23 Wis. 328; Martin v. Martin, 51 Me. 366; Goodwin v. Appleton, 22 Me. 453; People v. Brooks, 101 Mich. 98.

2, Tewksbury v. Schulenberg, 41 Wis. 584; Neaderhouser v. State, 27 Ind. 257; Cash v. Auditor, 7 Ind. 227. But not of the navigability of small streams not named in the general map or histories of the state, Buffalo Pipe Line Co. v. New York & W. Ry. Co., 10 Abb. N. C. (N. Y.) 107.

3, Price v. Page, 24 Mo. 65.

4, Cash v. Auditor, 7 Ind. 227.

5, Tewksbury v. Schulenberg, 41 Wis. 584.

6, Pearce v. Langfit, 101 Pa. St. 507; 47 Am. Rep. 737; Manning v. Gasharie, 27 Ind. 399; Fitzpatrick v. Papa, 89 Ind. 17. But not of the length of time required for an express company to transport money from one city to another, Rice v. Montgomery, 4 Biss. (U. S.) 75.

7, Carey v. Reeves, 46 Kan. 571.

8, Gulf Ry. Co. v. State, 72 Tex. 404.

9, Oppenheim v. Wolf, 3 Sand. Ch. (N. Y.) 571.

10, Texas & P. Ry. Co. v. Black, (Tex.) 27 S. W. Rep. 118.

11, Hawkins v. Thomas, 3 Ind. App. 399.

12, State v. Braskamp, 87 Iowa 588; Hinckley v. Beckwith, 23 Wis. 328; State v. County Court of Jackson County, 89 Mo. 237; People v. Williams, 64 Cal. 87.

13, Hoyt v. Russell, 117 U. S. 401; Brunson v. Clark, 715 Ill. 495. See note, 89 Am. Dec. 678.

14, *Mutual Ben. Life Ins. Co. v. Robison*, 58 Fed. Rep. 723.

15, *State v. Pennington*, 124 Mo. 388; *Rogers v. Cady*, 104 Cal. 288; *Jones v. Town of Lake View*, 151 Ill. 663.

16, *Goodwin v. Appleton*, 22 Me. 453; *People v. Etting*, 99 Cal. 577; *People v. Curley*, 99 Mich. 238; *Lewis v. State*, (Tex. Cr. App.) 24 S. W. Rep. 903.

17, *Com. v. Wheeler*, 162 Mass. 429.

§ 128. Surveys — Plats and streets.—

The surveys of the public lands are made pursuant to statute and are proper subjects of judicial notice,¹ as are the public statutes relating to such lands.² Thus the courts take cognizance of the situation of quarter sections under such surveys³ and of their areas,⁴ of the areas of counties within the state and the boundary lines of such counties,⁵ of the division of each section into forty acre tracts,⁶ of grants by the United States to a state and of the invalidity of a patent to state lands;⁷ also that there can be no such description under the government survey as the "south-east side" of a quarter section;⁸ that the land described is in a given county when no other county contains a township and range answering to the description;⁹ that the south lines of a given section and township are the same;¹⁰ that a particular legal subdivision of a section of land in the state is not fractional,¹¹ and that given lands are within an indian reservation.¹² In a few instances the courts have judicially noticed *city plats* and the lo-

cation of well known *streets* in cities of the state as well as the directions in which they run,¹³ but they do not notice judicially such things as the width of streets or side walks in a city;¹⁴ or that a certain street in the city of New York was likely to be deserted in the evening;¹⁵ or that a particular number of a street is in a given ward;¹⁶ nor will courts notice judicially the point of intersection of a given street and a railroad track.¹⁷

1, Wright v. Phillips, 2 G. Greene (Iowa) 191; Atwater v. Schenck, 9 Wis. 160; Dickenson v. Breeden, 30 Ill. 279; Gardner v. Eberhardt, 82 Ill. 316. See also Allegheny v. Nelson, 25 Pa. St. 332. Judicial notice is not taken of private surveys, Campbell v. West, 86 Cal. 197. The court does not know without proof the quantity of land contained within given courses and distances, Tison v. Smith, 8 Tex. 147.

2, Houlton v. Chicago, St. P., M. & O. Ry. Co., 86 Wis. 59; Duren v. Houston & T. C. Ry. Co., 86 Tex. 287; Caha v. United States, 152 U. S. 211.

3, Prieger v. Exchange Ins. Co., 6 Wis. 89; Dickenson v. Breeden, 30 Ill. 279.

4, Quinn v. Windmiller, 67 Cal. 461.

5, Board of Commissioners v. Spitler, 13 Ind. 235; Ham v. Ham, 39 Me. 263.

6, Prieger v. Exchange Ins. Co., 6 Wis. 89; Atwater v. Schenck, 9 Wis. 160; Hill v. Bacon, 43 Ill. 477.

7, People v. Center, 66 Cal. 566; Houlton v. Chicago, St. P., M. & O. Ry. Co., 86 Wis. 59.

8, Buchanan v. Whitman, 36 Ind. 257.

9, Bryan v. Scholl, 109 Ind. 367.

10, Kile v. Town of Yellowhead, 80 Ill. 208.

11, Peck v. Sims, 120 Ind. 345.

12, *French v. Lancaster*, 2 Dak. 346.

13, *Brady v. Page*, 59 Cal. 52; *Whittaker v. Eighth Ave. Ry. Co.*, 5 Rob. (N. Y.) 650; *Ritchie v. Catlin*, 86 Wis. 109; *State v. Ruth*, 14 Mo. App. 226. Contra, *Cicotte v. Ancieaux*, 53 Mich. 227.

14, *Porter v. Waring*, 69 N. Y. 250.

15, *Lenahan v. People*, 3 Hun 164.

16, *Allen v. Scharinghausen*, 8 Mo. App. 229.

17, *Pennsylvania Co. v. Frana*, 13 Ill. App. 91.

§ 129. Matters of science and art.—

No proof is required of those facts in science and the arts which are so generally known as to be matters of common knowledge¹ as, for example, the use of the telephone and the processes employed in the art of photography, together with their results and the principles on which they are based;² the fact that natural gas is an inflammable and explosive substance intrinsically dangerous;³ that tobacco and cigars are not drugs and medicines,⁴ and of the variation of the magnetic needle.⁵ Perhaps this principle has its most frequent application in patent cases in which the courts constantly take judicial notice of the character and mode of use of well-known articles.⁶ The case of *Brown v. Piper* in the supreme court of the United States furnishes a good illustration of the manner in which the courts may act upon their own knowledge in this class of cases. The controversy related to the novelty of a patent for preserving fish and other articles in a close chamber by

means of a freezing mixture, having no contact with the atmosphere of the preserving chamber. Although the pleadings and proofs in the case were silent on the subject, the court held that the alleged invention involved no principle different from that long applied in the common ice cream freezer, of which the court took judicial notice.⁷ On the same principle the courts take judicial notice that certain well known liquors like whiskey, lager beer, wine, brandy, blackberry brandy and ale are intoxicating drinks.⁸ It has sometimes been held otherwise as to beer;⁹ but the decided weight of authority sustains the rule that the courts will take notice that beer is intoxicating. A judge in Wisconsin had decided views on the subject which he thus expressed to the jury: "I think a man must be a driveling idiot who does not know what beer is." The supreme court of the state concurred in his view.¹⁰ Said Mr. Justice Metcalf: "No jury can be supposed to be so ignorant as not to know what gin is. Proof, therefore, that the defendant sold gin is proof that he sold intoxicating liquor."¹¹

1, Luke v. Calhoun Co., 52 Ala. 115; Adler v. State, 55 Ala. 16; Udderzook's Case, 76 Pa. St. 340; State v. Goyette, 11 R. I. 592; Schlict v. State, 56 Ind. 173; Com. v. Peckham, 2 Gray 514.

2, Globe Printing Co. v. Stahl, 23 Mo. App. 451; Luke v. Calhoun Co., 52 Ala. 115.

3, Jamieson v. Indiana Gas Co., 128 Ind. 555. See Mississineva Co. v. Patton, 129 Ind. 472.

4, *Com. v Marzynski*, 149 Mass. 68.

5, *Bryan v. Beckley*, Litt. Sel. Cas. (Ky.) 91; 12 Am. Dec. 276.

6, *Brown v. Piper*, 91 U. S. 37; *King v. Gallun*, 109 U. S. 99; *Slawson v. Railway Co.*, 107 U. S. 649; *Phillips v. Detroit*, 111 U. S. 606; *Reckendorfer v. Faber*, 92 U. S. 347; *Hendy v. Iron Works*, 127 U. S. 375; *Ligowski Clay Pigeon Co. v. Clay Bird Co.*, 34 Fed. Rep. 332. For example, the inflammable character of coal oil, *State v. Hayes*, 78 Mo. 307. But in an action on an insurance policy the court refused to take judicial notice that gin and turpentine were inflammable within the meaning of the contract, *Mosley v. Vermont Ins. Co.*, 55 Vt. 142; that kerosene oil is a refined coal oil or a refined earth oil are not facts to be taken notice of judicially, *Bennett v. North British & M. Ins. Co.*, 8 Daly (N. Y.) 471. Contra, *Morse v. Buffalo Ins. Co.*, 30 Wis. 534; that fine coal dust is explosive, *Cherokee Coal Co. v. Wilson*, 47 Kan. 460. But in patent cases the courts will not take judicial notice of facts because they are stated in cyclopedias or other books, *Dick v. Supply Co.*, 25 Fed. Rep. 105; *Kaolatype Engrav. Co. v. Hoke*, 30 Fed. Rep. 444; *New York Belt Co. v. Rubber Co.*, 30 Fed. Rep. 785; *West v. Rae*, 33 Fed. Rep. 45; nor of facts not generally known, *Kaolatype Engrav. Co. v. Hoke*, 30 Fed. Rep. 444; nor of facts the reality of which is in doubt, *Blessing v. Copper Works*, 34 Fed. Rep. 753.

7, *Brown v. Piper*, 91 U. S. 37.

8, *Briffitt v. State*, 58 Wis. 39; 46 Am. Rep. 621 (beer); *Fenton v. State*, 100 Ind. 598 (blackberry brandy); *Watson v. State*, 55 Ala. 158 (beer); *State v. Goyette*, 11 R. I. 592 (beer); *Schlichl v. State*, 56 Ind. 173 (whiskey); *Com. v. Peckham*, 2 Gray 514 (gin); *State v. Church*, (S. Dak.) 60 N. W. Rep. 143 (beer); *Thomas v. Com.*, 90 Va. 92 (apple brandy).

9, *People v. Hunt*, 24 How. Pr. (N. Y.) 289; *Shaw v. State*, 56 Ind. 188; *Bell v. State*, 91 Ga. 227.

10, *Briffitt v. State*, 58 Wis. 39; 46 Am. Rep. 621.

11, *Com. v. Peckham*, 2 Gray 514.

§130. Invariable course of nature.—Judicial notice will be taken of facts which must invariably happen in the course of nature, such as the recurrence of the seasons, public fasts and festivals, the coincidence of the days of the week with the days of the month and of the year,¹ as that a certain day fell on Sunday, and the court may so charge the jury;² so the courts take judicial notice of the difference of time between places having different longitude;³ of the time when the sun and moon rise and set on a given day;⁴ of the course of the heavenly bodies;⁵ of the meaning of the word "month," and of the order of the months;⁶ of the general course of agriculture, as the general time for planting and harvest;⁷ of the time of the maturity of crops in the vicinity;⁸ of the effect of dams upon streams of water;⁹ of the laws governing birth, as that one is not the father of a child when non-access is proved until insufficient time before the birth;¹⁰ of the average duration and expectancy of human life, and of the Northampton and American tables of mortality.¹¹ In the same manner the courts should recognize the existence of ordinary instincts and passions which universally in a greater or less degree influence the actions of mankind.¹² In a recent case the New York court of appeals applied this branch of the law of judicial notice in a somewhat novel manner. In an action by a brakeman

against a railroad company for personal injury, it was claimed that the injury had been received by the plaintiff while sitting on top of a box car while going through a tunnel; and the negligence claimed was that the company had not given him notice of a brick arch in the tunnel which reduced its height to four feet, seven inches above the top of the car. No evidence was given at the trial as to the plaintiff's size or height; but the appellate court took judicial notice of the fact that the average height of men is less than six feet; that, in view of the usual proportions of the different parts of the human system, the plaintiff's head could not have struck the obstruction while he was in a sitting posture unless he was nine feet in height.¹³ But the alleged laws or course of nature must be of certain and unvarying occurrence; hence the extraordinary vicissitudes of climate are not so noticed;¹⁴ nor is the age of a tree judicially noticed from the concentric layers as shown in the trunk.¹⁵

1, *Allman v. Owen*, 31 Ala. 167; *Sprowl v. Lawrence*, 33 Ala. 673. In *Philadelphia Ry. Co. v. Lehman*, 56 Md. 209, it was held error for the court to refuse to permit counsel to use an almanac in argument to the jury to show that a witness had falsified as to a date, though the almanac had not been used in evidence. See also *Wilson v. Van Leer*, 127 Pa. St. 371; 14 Am. St. Rep. 854. See notes, 39 Am. Rep. 416; 59 Am. Dec. 690 on the general subject of this section.

2, *McIntosh v. Lee*, 57 Iowa 356; *Swales v. Grubbs*, 126 Ind. 106.

3, *Curtis v. March*, 4 Jur. N. S. 1112.

4, *People v. Chee Kee*, 61 Cal. 404; *Agar v. Tibbets*, 46 Hun 52.

5, *Tutton v. Darke*, 5 Hurl. & N. 649; Tayl. Ev. sec. 20.

6, *Hoyle v. Lord Cornwallis*, 1 Str. 387; *Harry v. Broad*, 2 Salk. 626; Tayl. Ev. sec. 16.

7, *Tomlinson v. Greenfield*, 31 Ark. 557; 89 Am. Dec. 691; *Floyd v. Ricks*, 14 Ark. 286; 58 Am. Dec. 374; *Ross v. Boswell*, 60 Ind. 235; *Abel v. Alexander*, 45 Ind. 523; *Wetzler v. Kelly*, 83 Ala. 440.

8, *Floyd v. Ricks*, 14 Ark. 286; 58 Am. Dec. 374; *Ross v. Boswell*, 16 Ind. 235; *Brown v. Anderson*, 77 Cal. 236. But not of the precise day a given crop reaches its maturity, *Culverhouse v. Worts*, 32 Mo. App. 419.

9, *Tewksbury v. Schulenberg*, 41 Wis. 584.

10, *Heathcote's Divorce*, 1 Macq. 277; *Rex v. Luffe*, 8 East 202; *Whitman v. State*, 34 Ind. 360; Tayl. Ev. sec. 16; 1 Whart. Ev. sec. 334.

11, *Johnson v. Hudson Ry. Co.*, 6 Duer (N. Y.) 633; *Davis v. Standish*, 26 Hun 608; *Gordon v. Tweedy*, 74 Ala. 232; 49 Am. Rep. 813; *Northeastern Ry. Co. v. Chandler*, 84 Ga. 37; *Blair v. Madison Co.*, 81 Iowa 313. The courts will also take notice of the ordinary limitations of human life, *Floyd v. Johnson*, 2 Litt. (Ky.) 109.

12, 1 Whart. Ev. sec. 336. No proof is necessary that the loss of an arm will interfere with ordinary business and cause pain, *Chicago Ry. Co. v. Warner*, 108 Ill. 538.

13, *Hunter v. New York, O. & W. Ry. Co.*, 116 N. Y. 615.

14, *Dixon v. Nicholls*, 39 Ill. 372.

15, *Patterson v. McCausland*, 3 Bland (Md.) 69. Courts do not take judicial notice that cattle are at certain seasons liable to communicate disease, *Bradford v. Floyd*, 80 Mo. 207.

§ 131. Meaning of words and phrases —
The scriptures.—The meaning of current English words, phrases and idioms generally

understood in the community need not be proven, even though not contained in any dictionary.¹ The changes in the meaning of words are judicially noticed.² A case often cited in illustration of the rule that courts will take judicial notice of well known literary or classical allusions is that of *Hoare v. Silverlock*, in which it was held that, where a libel charged that the friends of the plaintiff had "realized the fable of the frozen snake," the court would take notice that the knowledge of that fable existed generally in society.³ In like manner and for stronger reasons the courts take judicial notice of the contents of the bible, of the numerous sects into which the religious world is divided and also of the general doctrines maintained by each sect; for example, that there are numerous organizations called Christians respectively maintaining different and conflicting doctrines respecting predestination, eternal punishment, the infallibility of the scriptures and the like.⁴

1, For example the meaning of the words "squatter riot" in California, *Clarke v. Fitch*, 41 Cal. 472; the word "sack," *Edwards v. St. Jose Printing Co.*, 99 Cal. 431; the words "Beecher business" used of a minister, *Bailey v. Kalamazoo Publishing Co.*, 40 Mich. 251; the meaning of "whiskey" and "malt liquor," *Frese v. State*, 23 Fla. 267; *Adler v. State*, 55 Ala. 16; and the meaning of "gift enterprise," *Lohman v. State*, 81 Ind. 15. But the rule does not extend to words or their pronunciation in a foreign language, *State v. Johnson*, 26 Minn. 316. For other illustrations see note, 89 Am. Dec. 663-692.

2, *Edgar v. McCutchen*, 9 Mo. 759; *Linck v. Kelley*, 25 Ind. 278; 87 Am. Dec. 362.

3, *Vanada v. Hopkins*, 1 J. J. Marsh. (Ky.) 285; 19 Am. Dec. 92. *Hoare v. Silverlock*, 12 Adol. & Ell. N. S. 624.

4, *Taylor v. Barclay*, 2 Sim. 221; *State ex rel. Weiss v. District Board*, 76 Wis. 177, 191.

§ 132. Abbreviations.—The courts take judicial notice of the meaning of the common abbreviations of christian names;¹ of abbreviations of the letters frequently used by administrators, executors, justices of the peace, notaries and other officers to designate their official title;² of the initials and abbreviations used in the description of land in conveyances, judicial sales and assessments for taxes and other public proceedings,³ and of the meaning of abbreviations in very general use in business affairs, as the letters C. O. D.⁴

1, *Stephens v. State*, 11 Ga. 225.

2, *Moseley's Adm. v. Mastin*, 37 Ala. 216. See note, 89 Am. Dec. 692.

3, *Kile v. Town of Yellowhead*, 80 Ill. 208; *Power v. Bowdle*, 3 N. Dak. 107. Contra, *Vivian v. State*, 16 Tex. App. 262. See note, 89 Am. Dec. 692.

4, *State v. Intoxicating Liquors*, 73 Me. 278. But it was held otherwise in *McNichol v. Pacific Ex. Co.*, 12 Mo. App. 401. In *Alcolo v. Chicago, B. & Q. Ry. Co.*, 70 Iowa 185, the court refused to take judicial notice of the meaning of the letters C., B. & Q. Ry. Co.; and the court declined to take judicial notice of the meaning of printers' marks at the foot of an advertisement in *Johnson v. Robertson*, 31 Md. 476. See note, 89 Am. Dec. 692.

§133. Methods and customs of business. — There are other facts connected with the transaction of business so generally understood as to be judicially noticed. Thus the system of checking baggage by railroads over several lines to the end of the route;¹ the custom of railroad companies to transfer from one to another loaded cars for continuous transportation over different lines,² the nature and business of mercantile agencies,³ the methods of transporting cattle by railroads,⁴ the changes in the modes of business and new methods in carrying on trade,⁵ the general mode of conveying the public mails,⁶ the ordinary powers of cashiers of banks,⁷ the custom of banks to remit by draft instead of sending specie,⁸ the powers of superintendents of railroads⁹ and of agents in charge of mines,¹⁰ that engineers are employed to establish railroad grades and that railroad trains are directed and controlled by the owners of the road.¹¹ Courts also take judicial notice of the nature and modes of business of lotteries;¹² that vacant buildings as a class are more exposed to damage from fire than they would be if occupied;¹³ that carrying on the business of a barber on Sunday is not necessary,¹⁴ and of the results of taking the census.¹⁵ Other illustrations of the rule are cases where cognizance has been taken that the free masons form a charitable organization,¹⁶ or of the character of such pub.

lic institutions as court houses, state banks and public prisons.¹⁷

1, Isaacson v. New York Cent. Ry. Co., 94 N. Y. 278; 46 Am. Rep. 142.

2, Burlington Ry. Co. v. Dey, 82 Iowa 312.

3, Eaton v. Avery, 83 N. Y. 31. But see Holmes v. Harrington, 20 Mo. App. 661.

4, Michigan Ry. Co. v. McDonough, 21 Mich. 194.

5, Wiggins Ferry Co. v. Chicago & Alton Ry. Co., 5 Mo. App. 347; Sacalaris v. Eureka & Palisade Ry. Co., 18 Nev. 155; 51 Am. Rep. 737.

6, Gamble v. Central Ry. Co., 80 Ga. 595; 12 Am. St. Rep. 276.

7, Sturges v. Bank of Circleville, 11 Ohio St. 153. But see La Rose v. Logansport Nat. Bank, 102 Ind. 332.

8, Bowman v. First Nat. Bank, 9 Wash. 614.

9, Sacalaris v. Eureka & Palisade Ry. Co., 18 Nev. 155; 51 Am. Rep. 737. But not of the duties of the servants of a company in managing trains, McGowan v. Railroad Co., 61 Mo. 525; Highland Ry. Co. v. Walters, 91 Ala. 435.

10, Adams Co. v. Senter, 26 Mich. 73.

11, South & North Ala. Ry. Co. v. Pilgreen, 62 Ala. 305.

12, Lohman v. State, 81 Ind. 15; Saloman v. State, 28 Ala. 83.

13, White v. Phoenix Ins. Co., 83 Me. 279.

14, State v. Frederick, 45 Ark. 347; 55 Am. Rep. 555.

15, People v. Williams, 64 Cal. 87.

16, Burdine v. Grand Lodge of Ala., 37 Ala. 478.

17, Shaw v. State, 3 Sneed (Tenn.) 86; Buell v. Warner, 33 Vt. 570; Davis v. Bank of Fulton, 31 Ga. 69; Terry v. Merchant's Bank, 66 Ga. 177. See also sec. 124 *supra*.

§ 134. Facts not within the memory of the judge.—It does not necessarily fol-

low that the judge should refuse to take judicial notice of a fact when his memory is at fault in respect to the same. It frequently happens that it is necessary or proper for the court to refer to sources of information concerning matters which have not been referred to in the evidence. Dr. Wharton thus states the principle:¹ "The judge may consult works on collateral sciences or arts, touching the topic on trial. He may draw, for instance, on mythology, in order to determine the meaning of similes in an ambiguous writing."² He may refer to almanacs;³ he may appeal to his own memory for the meaning of a word in the vernacular;⁴ he may, as to the meaning of terms, refer to dictionaries of science of all classes;⁵ he may determine the meaning of abbreviations of christian names and offices, and of other common terms;⁶ as to a point of political history (*e. g.* the recognition of a foreign government) he may consult the executive department of the state;⁷ he may cause inquiry to be made as to the practice of other courts;⁸ and Lord Hardwicke went so far as to inquire of an eminent conveyancer as to a rule of conveyancing practice.⁹ And so the court may have recourse to the legislative rolls to determine the construction of a statute."¹⁰ It is hardly necessary to add that *no evidence* need be given of those facts of which the court should take judicial notice. If the memory of the judge is at fault he may

refer to such sources of information as have already been indicated or he may refuse to take judicial notice of the matter in question, until the party asking him to do so can produce some document at the trial by which his memory may be refreshed.

1, Whart. Ev. sec. 282.

2, United States v. Teschmaker, 22 How. 392; Hoare v. Silverlock, 12 Jur. 695; 12 Q. B. 624.

3, Page v. Faucet, Cro. El. 227; Tutton v. Darke, 5 Hurl. & N. 649; Allman v. Owen, 31 Ala. 167; Sprowl v. Lawrence, 33 Ala. 674.

4, R. v. Woodward, 1 Moody Cr. C. 323; Clementi v. Golding, 2 Camp. 25; Moufflet v. Cole, L. R. 7 Exch. 70; Com. v. Kneeland, 20 Pick. 229. As to local idioms, see *In re* Bodmin Mines Co., 23 Beav. 370.

5, Clementi v. Golding, 2 Camp. 25.

6, Stephen v. State, 11 Ga. 225; Moseley v. Mastin, 37 Ala. 216. But see Russell v. Martin, 15 Tex. 238; Weaver v. McElhenon, 13 Mo. 89.

7, Taylor v. Barclay, 2 Sim. 221; Jones v. United States, 137 U. S. 202.

8, Doe v. Lloyd, 1 Man. & G. 685; Chandler v. Grieves, 2 H. Black. 606 note a.

9, Willoughby v. Willoughby, 1 T. R. 772.

10, R. v. Jeffries, 1 Str. 446.

§135. Facts of which jurors take judicial notice.—At an early stage of the common law jurors were selected because of their supposed private knowledge of the facts in issue; and they were expected to use such knowledge. “The law supposed them to have

knowledge of and capacity to try the Matter in Issue (and so they must), though no Evidence were given on either side in court; but to this the Judge is a Stranger, i. e., he cannot Judge without evidence though the Jury may."¹ But this is not the modern rule. In this respect judge and jury stand upon common ground. Neither *judges nor jurors* can properly act upon their mere personal or *private knowledge* of special facts without evidence; for example, they cannot properly act upon their own private knowledge of the character of parties or of witnesses,² or of the prices of commodities, or of the state of the weather at a time past,³ or that some of the parties to the action are dead or non-residents of the state.⁴ But judge and jury alike may act upon and take notice of those facts which are of such notoriety as to be matters of common knowledge.⁵

1, Anonymous, Law of Evidence published in 1735, cited by Mr. Thayer in 3 Harv. Law Rev. 300.

2, Schmidt v. Insurance Co., 1 Gray 529.

3, McCormick Co. v. Jacobson, 77 Iowa 582.

4, Wheeler v. Webster, 1 E. D. Smith (N. Y.) 1; State v. Edwards, 19 Mo. 674; Mayor of New Orleans v. Ripley, 5 La. 121; 25 Am. Dec. 175.

5, Com. v. Peckham, 2 Gray 514; Briffit v. State, 58 Wis. 39; Head v. Hargrave, 105 U. S. 45; Bradford v. Cunard Co., 147 Mass. 55; State v. Maine Cent. Ry. Co., 86 Me. 309.

CHAPTER 5.

RELEVANCY.

- § 136. Relevancy — In general.
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- § 139. Same, continued.
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- § 149. Same — Nature of the proof — Pleadings — Rumors.
- § 150. Character — Actions for breach of promise of marriage.
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- § 153. Character in actions for fraud.
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- § 165. Facts apparently collateral — Value of lands.
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- § 170. General rules as to relevancy.
- § 171. Province of judge and jury.
- § 172. Same — Mixed questions of law and fact — Construction of writings — Statutes, etc.
- § 173. The court decides questions of law — Criminal cases.

§ 136. Relevancy — In general.— " Of all rules of evidence the most universal and most obvious is this, that the evidence adduced should be alike directed and confined to matters which are in dispute, or which form the subject of investigation. The theoretical propriety of this rule never can be a matter of doubt, whatever difficulties may arise in its application. The tribunal is created to determine matters, which either are in dispute between contending parties or

otherwise require proof; and anything which is neither directly nor indirectly relevant to those matters ought at once to be put aside, as beyond the jurisdiction of the tribunal and as tending to distract its attention and to waste its time. '*Frustra probatur quod probatum non relevat.*' " ¹ Notwithstanding the great importance of this rule it will not be necessary to give it so elaborate a discussion as some of the other rules of evidence. Other chapters of the work abound in illustrations of the subject. For example, the subjects of admissions, opinion evidence, *res gestæ*, hearsay, book entries and even other subjects might logically enough be grouped under the general title of relevancy. But it is deemed best to adopt the more usual classifications and therefore under this heading we shall only illustrate the meaning of the general rule and treat of certain classes of testimony, which form apparent exceptions to the rule, and which are not discussed in other chapters. According to Mr. Stephen, "the word 'relevant' means that any two facts to which it is applied are so related to each other that, according to the common course of events, one either taken by itself or in connection with other facts proves or renders probable the past, present or future existence, or non-existence of the other." ² Mr. Wharton defines relevancy as "that which conduces to the proof of a pertinent hypothesis." ³ But

in view of the complexity of human affairs and the infinite variety which questions of fact assume in courts of justice, it is obvious that no definition of the term "relevancy" can be very satisfactory or afford any very practical aid. Reforms in the rules of pleading have no doubt simplified the subject, and it is no longer necessary in a work upon evidence to elaborately discuss the different forms of issues, or the subject of variance, or other subjects connected with the technicalities of pleading; but there is no definition or statute or theory of relevancy which can very greatly aid in solving the constantly recurring problem, whether a given fact offered in evidence is relevant to prove the proposition in issue. Says Mr. Wharton: "It is relevant to put in evidence any circumstance which tends to make the proposition at issue either more or less improbable."⁴ Whether this proposition is too broadly stated or not, it is very clear that facts may be relevant in the sense that they would tend to prove some other material fact and yet be inadmissible as evidence. For example, a husband may not testify to the declarations of his wife, when she is a party to the suit; and an attorney may not testify to the communications of his client made in confidence. In these and other cases, which might be mentioned, the testimony is excluded, however relevant, by positive rules of law.⁵ So it is constant practice

for the courts to exclude circumstances which might tend toward proof of the propositions at issue, for the reason that such facts are too remote to be given probative effect in courts of justice.⁶ The difficulty of course lies in determining in each case whether the fact offered in evidence has such a natural or necessary connection with the fact to be proved, as to be relevant in the legal sense of that term.

1, Best Ev. sec. 251.

2, Stephen Ev. art. 1, p. 4; *Platner v. Platner*, 78 N. Y. 90; *Cole v. Boardman*, 63 N. H. 580.

3, 1 Whart. Ev. sec. 20.

4, 1 Whart. Ev. sec. 21; *Insurance Co. v. Weide*, 11 Wall. 438.

5, See *infra*, secs. 751 *et seq.* and 766 *et seq.*

6, See next section.

§ 137. Logical connection between fact offered and fact to be proved.—Although as a rule testimony should not be excluded as irrelevant on the ground that it may have but little weight, yet the law requires an open and visible connection between the principal and evidentiary facts and the deductions from them and does not permit a decision to be made on *remote inferences*.¹ Thus the fact that a party was hopelessly insolvent was held inadmissible on the issue whether he had furnished money to pay a certain note. So one's financial condition is irrele-

vant to the question whether he agreed with a physician that he should not pay unless cured;² and in an action for money lent, it is irrelevant that the defendant had money in the bank at that time.³ But evidence of the financial ability of the party to make the payments may be relevant as bearing on the question of when payments were to be made.⁴ Where it is the contract that a fixed sum shall be paid for goods or services, it is irrelevant to prove the value or usual price;⁵ and on a contention as to the proper amount of wages, evidence of the amount of wages received in like employment in other towns in another state is too remote.⁶ So evidence of the low price for which goods were sold is too remote to be admissible to disprove the claim of a warranty of quality.⁷ On the issue whether a certain partner did or did not sign a note sued on by an endorsee, evidence that the partners agreed among themselves that neither should sign such a note is irrelevant, the plaintiff having no knowledge of the agreement.⁸ The testimony of witnesses having no knowledge of the transaction should, of course, be rejected.⁹ Nor is it relevant to ask a witness his reason for believing certain facts,¹⁰ or his understanding based upon a conversation — the substance of the conversation should be given.¹¹ Obviously testimony collateral to the issues which would

merely tend to prejudice the jury should be rejected.¹²

1, *Xenia Bank v. Stewart*, 114 U. S. 224; *United States v. Ross*, 92 U. S. 281; *Durkee v. India Ins. Co.*, 159 Mass. 514.

2, *Hollywood v. Reed*, 55 Mich. 308.

3, *Burke v. Kaley*, 138 Mass. 464.

4, *Beckley v. Jarvis*, 55 Vt. 348.

5, *Hamilton v. Frothingham*, 59 Mich. 253; *Kvammen v. Meridean Mill Co.*, 58 Wis. 399; *Bright v. Metaire Ass'n*, 43 La. An. 58; *Board of Commissioners v. O'Connor*, 137 Ind. 622. Held otherwise where the evidence was conflicting as to whether a certain price was agreed upon. *Saunders v. Gallagher*, 53 Minn. 422.

6, *Noyes v. Fitzgerald*, 55 Vt. 49.

7, *Ockeshausen v. Durant*, 141 Mass. 338. But the cost price may be some evidence of value, *Howver v. Bell*, 141 N. Y. 140; ~~so is~~ the selling price, *Sanford v. Peck*, 63 Conn. 486.

8, *Bates v. Forcht*, 89 Mo. 121. Other illustrations where the inference sought to be drawn was too remote, *Swann v. Kidd*, 78 Ala. 173; *Kellogg v. Thompson*, 142 Mass. 76; *Harris v. Howard*, 56 Vt. 695; *Hathaway v. Tinkham*, 148 Mass. 85; *Patrick v. Howard*, 47 Mich. 40.

9, *Chadwick v. Chadwick*, 52 Mich. 545; *Patrick v. Graham*, 132 U. S. 627.

10, *McDonald v. Jacobs*, 77 Ala. 524

11, *Grubey v. Nat. Bank of Ill.*, 35 Ill. App. 354.

12, *Galveston Ry. Co. v. Smith*, (Tex. Civ. App.) 24 S. W. Rep. 668; *Russell v. Hearne*, 113 N. C. 361.

§ 138. **Same — Illustrations of relevant facts.**— But where there is such logical connection between the fact offered as evidence and the issuable fact that proof of the former

tends to make the latter more probable or improbable, the testimony proposed is relevant.

"The competency of a collateral fact to be used as the basis of legitimate argument is not to be determined by the conclusiveness of the inferences it may afford in reference to the litigated fact. It is enough if these may tend, even in a slight degree, to elucidate the inquiry or to assist, though remotely, to a determination probably founded on truth."¹

Among the general rules given by Mr. Stephen for determining relevancy is the following: "When there is a question whether any act was done by any person, the following facts are deemed to be relevant, that is to say — any fact which supplies a motive for such an act, or which constitutes preparation for it; any subsequent conduct of such person apparently influenced by the doing of the act, and any act done in consequence of it by or by the authority of that person."² For this purpose it is often competent to prove the *malice* or state of mind of a party,³ his *mode of life*, character or financial condition, when otherwise such testimony would have no bearing upon the issue.⁴ Equally familiar is the practice of proving, as parts of the chain of evidence, the *opportunity*, preparation, motive, desire or the intention of the party to do the act in question.⁵ On the other hand the party may show that by reason of physical or mental inability or ab-

sence it is impossible that the act in question should have been his act.⁶ On the same principle it is relevant to prove *misconduct* of the party in respect to the pending case, such as attempting to suppress or to fabricate testimony or bribe witnesses or jurors;⁷ and so it is relevant to prove the *demeanor* of a party accused of a crime or tort,⁸ his flight or concealment and his falsehoods,⁹ his attempts to fasten the crime upon others, his possession of property connecting him with the offense¹⁰ or statements made in his presence likely to affect his conduct. So "whenever any act may be proved, *statements accompanying and explaining that act* made by or to the person doing it may be proved, if they are necessary to understand it. In criminal cases (of rape) the conduct of the person against whom the offense is said to have been committed, and in particular the fact that (she) made a complaint soon after the offense to persons to whom (she) would naturally complain, are deemed to be relevant; but the terms of the complaint itself seem to be deemed to be irrelevant. When a person's conduct is in issue or is, or is deemed to be, relevant to the issue, statements made in his presence and hearing by which his conduct is likely to have been affected are deemed to be relevant." ¹¹

1, *Holmes v. Goldsmith*, 147 U. S. 150, 164; *Stevenson v. Stewart*, 11 Pa. St. 307.

2, Steph. Ev. art. 7. See cases cited below.

3, *R. v. Clews*, 4 Car. & P. 221; *Sayres v. Com.*, 88 Pa. St. 291; *McCue v. Com.*, 78 Pa. St. 185; *State v. Dickson*, 78 Mo. 438; *State v. Hannett*, 54 Vt. 83.

4, *Com. v. Ferrigan*, 44 Pa. St. 386; *Pierson v. People*, 79 N. Y. 424; 35 Am. Rep. 524; *Reinhart v. People*, 82 N. Y. 607; *Com. v. Webster*, 5 Cush. 295; 52 Am. Dec 711 and long note; *Com. v. Hudson*, 97 Mass. 565; *Com. v. Choate*, 105 Mass. 451; *Long v. Straus*, 124 Ind. 84.

5, *Jewett v. Banning*, 21 N. Y. 27; *Com. v. Goodwin*, 14 Gray 55; *Bruner v. Wade*, 84 Iowa 698; *Blakes v. Da-Cunha*, 126 N. Y. 293. See sec. 353 *et seq. infra*.

6, *Moulton v. Aldrich*, 28 Kan. 300, common practice of proving alibi.

7, *Cruikshank v. Gordon*, 118 N. Y. 178; *Hastings v. Stetson*, 130 Mass. 76; *Chicago City Ry. Co. v. McMahon*, 103 Ill. 485; 42 Am. Rep. 29; *Donohue v. People*, 56 N. Y. 208. See further, sec. 16 *et seq. supra*.

8, See subject of admissions, sec. 289 *et seq. infra*.

9, *Com. v. Tolliver*, 119 Mass. 312; *Ryan v. People*, 79 N. Y. 593; *Murray v. Chase*, 134 Mass. 92; *Com. v. Goodwin*, 14 Gray 55.

10, *Linsday v. People*, 63 N. Y. 143; *Com. v. Parmenter*, 101 Mass. 211; *Gardiner v. People*, 6 Park. Cr. (N. Y.) 157.

11, Steph. Ev. art. 8.

§ 139. **Same, continued.**—Although the authorities are agreed on the familiar proposition that the evidence must be confined to the facts put in issue by the pleadings, the rule should not be so arbitrarily or strictly construed as to exclude facts which raise a *reasonable inference* or presumption as to the matter in issue.¹ When a fact is in a legal

sense relevant to the issue, it is not to be excluded although apparently collateral. Under another head the authorities are cited which show that it may be competent to explain the nature of objects by experiments and by comparison with other objects, when preliminary proof is made that the conditions are the same. On the same principle models, maps, photographs and diagrams of objects under investigation are relevant to the issue where proved to be correct representations.² So it is familiar practice in arriving at the value of lands to receive testimony as to sales of other lands similarly situated;³ and when the date of an act is in dispute, it may be fixed by the contemporaneous occurrence of other acts, either notorious or distinctly remembered.⁴ So it is relevant to prove notoriety in the neighborhood where the parties reside to lay the foundation for an inference that one of the parties was cognizant of the fact, such knowledge being material.⁵ And it is familiar practice to prove the condition of machinery, of a highway or other object or the condition of health or state of mind at a given time by facts showing such condition at another time when the circumstances are such as to raise a fair inference that no change has taken place.⁶ In like manner when it is alleged that an engine of defendant has caused a fire, evidence is received to show that other similar engines owned by

the same railroad company have scattered fire near the place in question.⁷ Other illustrations of the subject under discussion will be found under appropriate titles in various parts of this work.⁸ It is impossible to lay down any exact test for determining in all cases the question of relevancy. The illustrations already given show the difficulty of defining where probability ceases and mere speculation begins. It is evident that, in the performance of this duty, something must be left to *judicial discretion*. There may be evidence having a slight probative effect, but so unimportant when compared with other better evidence easily available as to be properly excluded. This is especially so when the proposed testimony would unreasonably protract the trial and distract the attention of the jury by the investigation of facts having very slight or remote bearing on the case.⁹

1, But there must be proof of the similarity of conditions, *Lake Erie Ry. Co. v. Mugg*, 132 Ind. 168; *McCormick Co. v. Gray*, 100 Ind. 285.

2, See sec. 414 *infra*.

3, See sec. 165 *infra*.

4, *Ritter v. First Nat. Bank*, 30 Mo. App. 652; *Beakes v. Da Cunha*, 126 N. Y. 293; *Rollins v. Clement*, 25 S. C. 661.

5, *Kuglar v. Garner*, 74 Ga. 765.

6, *McCulloch v. Dobson*, 133 N. Y. 114, condition of a mill; *Shailer v. Bumstead*, 99 Mass. 112, state of mind.

7, See secs. 163, 164 *infra*.

8, Among others see secs. 145, 146, 161, 163, 164 *infra* as to highways, railroad fires, etc. For other cases see *Harrington v. Keteltas*, 92 N. Y. 40; *Buswell Co. v. Case*, 144 Mass. 350; *Ayres v. Hubbard*, 57 Mich. 322; *Mack v. Leedle*, 78 Iowa 164.

9, *Amoskeag Co. v. Head*, 59 N. H. 332; *Temperance Ass'n v. Giles*, 33 N. J. L. 260.

§140. Acts between strangers or between a party and strangers.—The question of relevancy less frequently arises when the offered proof relates to transactions which have transpired directly between the plaintiff and defendant; but it is constantly arising when the effort is made to prove the acts and declarations of strangers or of one of the parties to the action in his dealings with strangers. Such evidence, in general, "it would be manifestly unjust to admit, since the conduct of one man under certain circumstances or towards certain individuals, varying as it will necessarily do according to the motives which influence him, the qualities he possesses and his knowledge of the character of those with whom he is dealing, can never afford a safe criterion by which to judge of the behaviour of another man similarly situated, or of the same man towards other persons."¹ Thus when the defendant wishes to prove that a loan made to him by the plaintiff was for usurious interest, it is irrelevant to show that the plaintiff has been in the habit of making usurious loans to other persons.² In an action brought against a gas company for in-

jury to health caused by inhaling the gas, it was held inadmissible to prove that, wherever the gas escaped from similar defects in the pipes in the neighborhood of the plaintiff, sickness followed.³ In a case often cited on this subject, the action was between landlord and tenant and the issue was whether the rent was payable quarterly or half yearly, it was held irrelevant to show in what way other tenants paid their rent.⁴ In another leading case where the action was for goods sold and delivered, it was held irrelevant for the defendant to show on cross-examination by way of defense that the plaintiff had entered into contracts with other persons in a particular form for the purpose of proving that the contract sued on was not as represented by the plaintiff. In this case in discussing the question the learned judge said: "Does the fact of a person having once or many times in his life done a particular act in a particular way make it more probable that he has done the same thing in the same way upon another and different occasion? To admit such speculative evidence would, I think, be fraught with great danger; when indeed the question is one of guilty knowledge, as in case of a charge of uttering base coin or forged notes, such evidence is received as tending to establish a necessary ingredient in the crime."⁵ When the inquiry relates to the form in which the note in controversy was drawn, it is irrele-

vant to show that the drawer has made other notes in a certain way.⁶ Where the issue is whether the vendor of goods has sold those of good quality to a customer, it is irrelevant to show that, during the same time, the sales made to other customers were also of good quality.⁷ In an action on a note where the defence is an entire failure of consideration, it is error to admit evidence of a failure of consideration in similar transactions with other parties.⁸ Evidence that A. made a certain promise to B. is inadmissible on the issue whether he made a similar promise to C., who was similarly situated.⁹ Where the issue is whether the defendant committed an assault, it is irrelevant to show that he has committed another assault at a different time and place and upon a different person;¹⁰ and where the issue is whether the defendant obtained goods from the plaintiff by fraudulent representations, not intending to pay for them, evidence of other similar frauds committed by the defendant at about the same time is not admissible, unless it appears that such frauds and the obtaining of the goods in question were parts of one fraudulent scheme committed in pursuance of a common purpose.¹¹ In all such instances, although there may be a *similarity* between the transaction offered in evidence and the one to be proved, there is no such *logical or necessary connection* that the existence of one tends to prove that of the

other. There may also have been such dissimilar facts or circumstances, not offered in evidence, as to render the transaction relied on of no probative value. Other illustrations without limit might be given of transactions of this character which are held irrelevant as evidence, on the ground that they are "*res inter alios actæ*"; but the cases already cited sufficiently illustrate the principle and we will now discuss certain qualifications of the rule, one of which is suggested in the case last cited.

1, 1 Tayl. Ev. sec 317.

2, Jackson v. Smith, 7 Cow. 718; Hartman v. Evans, 38 W. Va. 669. See Ross v. Ackerman, 46 N. Y. 210. Other contracts are inadmissible to prove the terms of the contract in issue, Walworth v. Barron, 54 Vt. 677.

3, Emerson v. Lowell Gas Co., 3 Allen 410. But it is admissible to show that upon the escape of gas every member of the family became sick, Hunt v. Gas Co., 8 Allen 169.

4, Carter v. Pryke, 1 Peake 95.

5, Willes J. in Hollingham v. Head, 4 C. B. N. S. 391; 93 E. C. L. 388.

6, Iron Mt. Bank v. Murdock, 62 Mo. 70.

7, Holcombe v. Hewson, 2 Camp. 391. See also Harris v. Howard, 56 Vt. 695; Hathaway v. Tinkham, 148 Mass. 85; Campbell v. Russell, 139 Mass. 278.

8, Altman v. Fowler, 70 Mich. 57.

9, Kelley v. Schupp, 60 Wis. 76.

10, People v. Gibbs, 93 N. Y. 470. Of course the same rule applies generally to other offenses. Thus in an action for assault with intent to commit rape evidence that the plaintiff had made similar charges against other men, and that defendant had made similar attempts against other

women was held inadmissible, *Ogle v. Brooks*, 87 Ind. 600; 44 Am. Rep. 778. So as to habit of lying, *Com. v. Kennon*, 130 Mass. 39.

11, *Jordon v. Osgood*, 109 Mass. 457; 12 Am. Rep. 731.

§ 141. Facts apparently collateral may become relevant.—Facts which are apparently collateral may become relevant on proof that they are connected by some link with the matter in issue.¹ Mr. Taylor gives numerous instances of this exception to the general rule. Thus, although in general the customs of one manor are not relevant to prove the customs of another, yet if it be proved that the customs of the two manors are identical or that the one was derived from the other, then the customs of each will become evidence.² Other illustrations given by Mr. Taylor show that apparently collateral facts have been received to establish the ownership of land, when proof has been made to show such an *unity of character* between the spot in dispute and other parcels over which acts of ownership had been exercised as to lead to a fair inference that both were subject to the same rights and constituted in fact but parts of an entire property.³ It may be stated generally that, "when there is a question whether an act was accidental or intentional, the fact that such act formed part of a *series of similar occurrences*, in each of which the person doing the act was concerned, is deemed to be relevant."⁴

1, See note, 41 Am. Dec. 58.

2, Tayl. Ev. sec. 320; *M. of Anglesey v. Ld. Hatherton*, 10 M. & W. 235.

3, Tayl. Ev. secs. 322-324; *Brisco v. Lomax*, 8 Adol. & Ell. 198; 3 Nev. & P. 308; *Doe v. Kemp*, 7 Bing. 332; 2 Bing. N. C. 102; 2 Scott 9; *Bryan v. Winwood*, 1 Taunt. 208; *Dendy v. Simpson*, 18 C. B. 831; 86 E. C. L. 831; *Jones v. Williams*, 2 M. & W. 326; *Stanley v. White*, 14 East 332; *R. v. Brightside Bierlow*, 13 Q. B. 933; *Peardon v. Underhill*, 16 Q. B. 120; *Donegall v. Templemore*, 9 Ir. Law Rep. N. S. 374, 406; *In re Belfast Dock Act*, 1 R. 1 Eq. 128, 142; *Taylor v. Parry*, 1 Man. & G. 604, 615; 1 Scott N. R. 576.

4, Steph. Ev. art. 12, and cases cited. See secs. 146, 163, 164, 182 *infra*.

§ 142. Same—Knowledge—Intent. — The largest class of cases in which facts apparently collateral to the issue are admitted is that in which it becomes material to prove knowledge or intent. When it becomes material to show the motive or intent which inspired an act or the knowledge under which one has acted, it is relevant for such purpose, under certain limitations, to prove *other similar acts* which explain such motive or bring home to the party the knowledge sought to be proved. Mr. Stephen thus more fully states the rule: "When there is a question whether a person said or did something, the fact that he said or did something of the same sort on a different occasion may be proved, if it shows the existence on the occasion in question of any intention, knowledge, good or bad faith, malice or other state of mind, or

of any state of body or bodily feeling, the existence of which is in issue or is deemed to be relevant to the issue; but such acts or words may not be proved merely in order to show that the person so acting or speaking was likely on the occasion in question to act in a similar manner." ¹ It frequently happens that such motive or intent can be shown in no other way, while a single act might leave the secret motives of the party in doubt. Such act, in connection with others of the same character, may afford decisive proof and remove all uncertainty. ² It has often been held in civil cases that, on the question of intent to defraud, other similar acts or representations at about the same time as the one in question are relevant. ³ Thus where it is claimed that purchases were fraudulently made by one knowing himself to be insolvent and with the preconceived intent not to pay, it is relevant to show *other purchases* on credit at or about the same time. ⁴ In an action to set aside a sale of land on the ground that the vendee has falsely represented himself to be a man of property, it is relevant to show *similar representations* to others at about the same time to show a general scheme to amass property by fraud. ⁵ So on the issue of fraudulent intent, it is relevant to show other voluntary conveyances, conveyances to relatives or similar transactions with others tending to show a common fraudulent scheme. ⁶

Where it is claimed that the acceptor of a bill knows the name of the payee to be fictitious, it is relevant to show that he has accepted other bills drawn in the same manner before they could have been transmitted to him by the payee, if the payee had been a real person.⁷ If it is material to show a motive for a particular line of conduct and a purpose to defraud the plaintiff, it may be relevant to show *similar conduct toward another* at about the same time.⁸ But in cases of this character the evidence of other transactions is irrelevant, unless such collateral acts are shown to be so connected with the matters in litigation as to make it apparent that the party to be charged had a common purpose in both.⁹ From the necessity of the case, where evidence is circumstantial in its nature and offered to prove motive or intent, considerable latitude must often be allowed, since the force and effect of circumstantial facts usually and almost necessarily depend upon their connection with each other.¹⁰

1, Steph. Ev. art. 11. On the general subject of this section see extended note, 44 Am. Rep. 299-308.

2, State v. Lapage, 57 N. H. 245; 24 Am. Rep. 69; Wood v. United States, 16 Peters 342.

3, McKenny v. Dingley, 4 Greenl. (Me.) 172; Whittier v. Varney, 10 N. H. 291; Bradley v. Obear, 10 N. H. 477; Menfey v. Brace, 23 Barb. 561; Allison v. Matthiew, 3 Johns. 235; Olmsted v. Hotailing, 1 Hill 317; Com. v. Tuckerman, 10 Gray 173; Porter v. Stone, 62 Iowa 442; Bancroft v. Heringhi, 54 Cal. 120; Lockwood v. Doane, 107 Ill. 235;

Cook v. Perry, 43 Mich. 623. As to proof of similar negotiations with other persons, see *Butler v. Watkins*, 13 Wall. 456; *Castle v. Bullard*, 23 How. 172; *Mudsill Co. v. Watrous*, 61 Fed. Rep. 163.

4, *Hennequin v. Naylor*, 24 N. Y. 139; *Turner v. Luning*, 105 Cal. 124.

5, *McKenney v. Dingley*, 4 Greenl. (Me.) 172; *Wilson v. Carpenter*, (Va.) 21 S. E. Rep. 243; *French v. Ryan*, (Mich.) 62 N. W. Rep. 1016.

6, *Taylor v. Robinson*, 2 Allen 562.

7, *Gibson v. Hunter*, 2 H. Black. 288.

8, *Butler v. Walkins*, 13 Wall. 456.

9, *Williams v. Robbins*, 15 Gray 590; *Jordan v. Osgood*, 109 Mass. 457; 12 Am. Rep. 731.

10, *Moore v. United States*, 150 U. S. 57; *Alexander v. United States*, 138 U. S. 353; *Castle v. Bullard*, 23 How. 172; *Hendrickson v. People*, 10 N. Y. 13.

§ 143. Same — Proof of other crimes than the one in issue.—It is a familiar rule that it is improper on the trial of a defendant for a crime to prove that he has committed other crimes, having no connection with the one under investigation. Such other acts of criminality or immorality are not legally relevant and should not be dragged in to prejudice the defendant or to create a probability of guilt. The rule is so elementary that it is only necessary to discuss the exceptions which tend to illustrate the general rule.¹ In criminal cases the conduct of the prisoner on other occasions is sometimes relevant, where such conduct has no other connection with the charge under inquiry

than that it tends to throw light on what were his *motives and intentions* in doing the act complained of. Thus on trials for *uttering counterfeit bills* or coin and forged instruments, it has long been the practice to admit evidence of the uttering of similar counterfeit money or forgeries to other persons about the same time,² for while in a single case the uttering of counterfeit money might be perfectly consistent with innocence, the probabilities of guilty knowledge rapidly increase on proof of a continued dealing in the unlawful money. On an accusation for *receiving stolen property*, knowing it to have been stolen, evidence that the accused has frequently received similar articles under like circumstances from the same thief and stolen from the same person or place, knowing that they were stolen, is relevant to show guilty knowledge.³ The same rule has been applied in actions for *conspiracy*; for example, where the proof tended to show that the accused and a deputy collector had conspired to defraud the revenue by entering goods at an undervaluation, evidence of other transactions in furtherance of the common enterprise was held relevant.⁴ On the same principle in trials for *embezzlement*, other previous acts of the defendant of a similar character so intimately connected with the one under investigation as to show common criminal intent are relevant.⁵ On a charge of *arson*

it is relevant to show that the defendant had made other attempts to set fire to the buildings in question, when such attempts were sufficiently near to the time of the commission of the offense charged to justify the inference that the defendant then had a settled purpose to commit the offense.⁶ On the issue of *adultery* evidence of other acts of adultery or of familiarity between the same persons is relevant to show the adulterous disposition of the parties at the time of the act of which complaint was made.⁷ There has been considerable discussion whether, on the criminal charge of obtaining goods or money on *false pretenses*, it is relevant to show that the defendant has made other similar pretenses at another time and place. While it has been held in some courts that such evidence is irrelevant,⁸ yet by the weight of authority evidence of such other representations or transactions is received, when they show a common motive or intent and when the transactions are so connected in point of time and so similar in their other relations, that the same motive may reasonably be imputed to all.⁹ So courts have received evidence of *other offences*, when so connected as to form part of one entire transaction, in prosecutions for robbery,¹⁰ burglary¹¹ and arson.¹² "So where four indictments were found against a woman, which respectively charged her with poisoning her husband and two of her sons and

with attempting to poison a third son, evidence was tendered on the trial of the first indictment that arsenic had been taken by three sons a few months after their father's death; that all four parties, when taken ill, exhibited the same symptoms, and that the woman, who had lived in the same house with her husband and children, had been in the habit of preparing their meals."¹³

1, See valuable note on the subject of this section, 44 Am. Rep. 299-308.

2, Com. v. Stone, 4 Met. 43; Com. v. Bigelow, 8 Met. 235; People v. Farrell, 30 Cal. 316.

3, Copperman v. People, 56 N. Y. 591; Dunn's Case, 1 Moody Cr. C. 146; Coleman v. People, 58 N. Y. 555; State v. Ward, 49 Conn. 429; Kilrow v. Com., 89 Pa. St. 480; Schriedly v. State, 23 Ohio St. 130; Com. v. Jenkins, 10 Gray 485.

4, Bottomley v. United States, 1 Story 135. The same rule holds in conspiracy for fraudulent purchase of goods, Com. v. Eastman, 1 Cush. 189; 48 Am. Dec. 596 and note; Rex v. Roberts, 1 Camp. 399.

5, Com. v. Tuckerman, 10 Gray 173; Com. v. Shepard, 1 Allen 575; Rex v. Ellis, 6 Barn. & C. 145.

6, Com. v. Bradford, 126 Mass. 42; Com. v. McCarthy, 119 Mass. 354.

7, Com. v. Nichols, 114 Mass. 285; 19 Am. Rep. 346; in another county, Thayer v. Thayer, 101 Mass. 111; 100 Am. Dec. 110 and note; in another state, Com. v. Merriam, 14 Pick. 518; 25 Am. Dec. 420 and note.

8, Strong v. State, 86 Ind. 208; 44 Am. Rep. 292 and full note; Reg. v. Holt, Bell's Cr. Cas. 280. See also, Com. v. Jackson, 132 Mass. 16.

9, Mayer v. People, 80 N. Y. 364; People v. Shulman 80 N. Y. 373; Trogon v. Com., 31 Gratt. (Va.) 862; Com.,

v. Eastman, 1 Cush. 189; 48 Am. Dec. 596 and note. See also, Com. v. Jackson, 132 Mass. 16.

10, R. v. Ellis, 6 Barn. & C. 145; R. v. Winkworth, 4 Car. & P. 444.

11, R. v. Wylie, 2 Lee 983.

12, R. v. Long, 6 Car. & P. 179; R. v. Cobden, 3 Fost. & F. 833.

13, Tayl. Ev. sec. 328; Queen v. Geering, 18 Law J. M. C. 215; Zoldoske v. State, 82 Wis. 580.

§ 144. Same—Such evidence—How limited.—It is to be observed that in the many cases which have been cited on the subject under discussion, the familiar principle is recognized that evidence tending to prove a similar but distinct offense, for the purpose of raising an inference or presumption that the accused committed the particular act with which he is charged, is not relevant. Such evidence is only allowed to show the knowledge or intent of the party or to repel the inference of accident, and then only when the proof shows such a connection between the different transactions as raises a fair inference of a common motive in each.¹ In the course of a very elaborate discussion of this subject a learned judge stated the law in the following propositions: “(1) It is not permitted to the prosecution to attack the character of the prisoner, unless he first puts that in issue by offering evidence of his good character. (2) It is not permitted to show the defendant’s bad character by showing

particular acts. (3) It is not permitted to show in the prisoner a tendency or disposition to commit the crime with which he is charged. (4) It is not permitted to give in evidence other crimes of the prisoner, unless they are so connected by circumstances with the particular crime in issue as that the proof of one fact with its circumstances has some bearing upon the issue on trial other than such as is expressed in the foregoing three propositions."² In most of the cases cited the fact, apparently collateral, occurred at about the same time as the principal fact in question. But if the fact offered is otherwise relevant, it is immaterial whether it occurred before or after the one under investigation. And in some of the cases there had been an interval of several months; each case, as to the application of this rule, must depend largely upon its own circumstances and not unfrequently the limit must rest largely in the discretion of the judge presiding at the trial.³ The real test is that the evidence should be sufficiently significant in character and sufficiently near in point of time to have a tendency to lead the guarded discretion of a reasonable and just man to belief in the intent or motive sought to be proved.⁴

1, See cases already cited.

2, *State v. Lapage*, 57 N. H. 245; 24 Am. Rep. 75.

3, *Mayer v. People*, 80 N. Y. 364; 373 note; *Thayer v. Thayer*, 101 Mass. 111; 100 Am. Dec. 110 and note.

4, *Thayer v. Thayer*, 101 Mass. 111; 100 Am. Dec. 110 and note. See also extended note, 44 Am. Rep. 299-308.

§ 145. **Collateral facts to show good faith — Knowledge, etc.** — Most of the illustrations which have been given under this head have been instances in which it was the object to prove malice, bad faith or guilty knowledge. But of course on the same principle facts apparently collateral may be proved, if they show good faith or prudence or the knowledge or information on which a person has acted when such fact is in issue. Thus in an action for fraudulent representations as to the solvency of a person, the defendant may show, as bearing on his good faith, the general repute as to the solvency of such person at the time the representations were made.¹ The same principle is often illustrated in actions for *homicide* where proof is allowed of threats made by the deceased against the accused and communicated to him for the purpose of showing that he had reasonable ground to fear violence; and to show that he had acted in self defense.² When the *good faith* of a party is in issue, the proof is not confined to circumstances from which such good faith may be inferred, but the witness may state directly that he has acted in good faith.³

1, *Skeen v. Bumpstead*, 1 Hurl. & C. 358.

2, *Campbell v. People*, 16 Ill. 17; 61 Am. Dec. 49 and note, with full discussion of the subject.

3, *Snow v. Paine*, 114 Mass. 520. See sec. 167 *infra* and cases.

§ 146. Facts apparently collateral to repel the inference of accident.—There is another class of cases, perhaps hardly distinct in principle from those already referred to, in which it becomes necessary to show that the act under inquiry was not accidental; and in which it may be relevant to show that such act formed a part of a *series of similar occurrences* in each of which the person doing the act was concerned.¹ Thus in actions of homicide by poison or other secret mode it has been held admissible, in order to repel the inference of accident, to prove other mysterious or unexplained deaths in the same household.² On an indictment for malicious shooting, it has been held relevant to show that the accused had twice shot at the prosecutor on the same day.³ On the charge of burning a house for the insurance money, it is relevant to show that the accused had previously lived in several other houses in which fires had occurred for which he had received the insurance money.⁴ On the trial of an indictment for keeping a bawdy-house, it is relevant to show repeated arrests and convictions of girls at the house of the accused on the charge of being prostitutes.⁵

1, *State v. Lapage*, 57 N. H. 245, 249; 24 Am. Rep. 69 and note; *People v. Shulman*, 80 N. Y. 373, note; *Com. v. Bradford*, 126 Mass. 42; *Goersen v. Com.*, 99 Pa. St. 388; *Hope v. People*, 83 N. Y. 418; 38 Am. Rep. 460; *Steph. Ev. art. 12*.

2, *Reg. v. Roden*, 12 Cox Cr. C. 630, suffocation of children; *Reg. v. Cotton*, 12 Cox Cr. C. 400, poison; *R. v. Geering*, 18 Law J. M. C. 215, poison; *Zoldoske v. State*, 82 Wis. 580, poison.

3, *R. v. Voke*, Russ. & R. Cr. C. 531.

4, *R. v. Gray*, 4 Fost. & F. 1102.

5, *Harwood v. People*, 26 N. Y. 190; 84 Am. Dec. 175.

§ 147. Character — When relevant.—

Under what circumstances is the character of a litigant relevant as evidence? If it is charged that a party has been guilty of an unlawful or of an immoral act, the fact that he is known to have many times committed similar acts would no doubt be a circumstance which would in the ordinary affairs of life weigh heavily against him. In popular estimation few facts are more potent in determining the merits of any claim than the character of the respective litigants; and yet it is the general rule of law that in civil actions the character of the parties is irrelevant. However just the inferences, which might in many cases be drawn as to the merits of the controversy from the character of the parties, such inferences are too vague and unreliable for that degree of certainty which should prevail in legal tribunals.¹ Thus in a civil action for assault and battery, the de-

fendant cannot prove his good character,² nor the bad repute of the plaintiff.³ In an action by a physician for fees, the defendant cannot attack the plaintiff's general professional character;⁴ nor is character relevant in actions for trespass,⁵ trover,⁶ negligence⁷ or divorce.⁸ For still more obvious reasons the character of the parties is generally irrelevant in actions on contracts.⁹ We have already seen that in actions based on *negligence* it is irrelevant to prove that the plaintiff or the defendant has on similar occasions been careful or negligent; in like manner it is irrelevant to show that either party has hitherto had the reputation of being prudent or negligent.¹⁰ In a Massachusetts case in which this rule was upheld, it was suggested that if such evidence ought ever to be received, which the court doubted, it should be only in cases where the proof of the alleged negligence depends on circumstantial evidence or on the testimony of witnesses of doubtful veracity.¹¹ But on principle there would seem to be no ground for any such qualification of the general rule. Many other illustrations might be given of the general rule that in civil actions evidence of the character of the parties is irrelevant. They all rest on the ground that the inferences raised from such testimony are too uncertain upon which to base any presumption, favorable or unfavorable, as to the merits of the given case.¹²

1, See illustrations below. See extended note, 20 L. R. A. 609-619 on the general subject of proof of character discussed in this and in the succeeding sections. See also articles, Andremus Stewart, "Evidence of Character and Reputation," 32 Am. L. Reg. 229; W. F. Elliott, "Evidence of Character in Criminal Cases," 9 Crim. L. Mag. 443.

2, *Fahey v. Crathy*, 63 Mich. 383; 6 Am. St. Rep. 305; *Elliott v. Russell*, 92 Ind. 526; *Thompson v. Church*, 1 Root (Conn.) 312; *Givins v. Bradley*, 3 Bibb (Ky.) 192; 6 Am. Dec. 646; *Reed v. Kelley*, 4 Bibb (Ky.) 400; *Willis v. Forrest*, 2 Duer (N. Y.) 310; *Porter v. Seiler*, 23 Pa. St. 424; 62 Am. Dec. 341.

3, *Bruce v. Priest*, 5 Allen 100; *Corning v. Corning*, 6 N. Y. 97; *Drohn v. Brewer*, 77 Ill. 280.

4, *Jeffries v. Harris*, 3 Hawks (N. C.) 105.

5, *Cummins v. Crawford*, 88 Ill. 312; 30 Am. Rep. 558.

6, *Wright v. McKee*, 37 Vt. 161.

7, *Com. v. Worcester*, 3 Pick. 462; *Boggs v. Lynch*, 22 Mo. 563.

8, *Ward v. Herndon*, 5 Port. (Ala.) 382; *Humphrey v. Humphrey*, 7 Conn. 116; *Berdell v. Berdell*, 80 Ill. 604; *Dwyer v. Dwyer*, 2 Mo. App. 17; *Washburn v. Washburn*, 5 N. H. 195. Contra, *O'Bryan v. O'Bryan*, 13 Mo. 16; 53 Am. Dec. 128 and note.

9, *Battles v. Landenslager*, 84 Pa. St. 446.

10, *Tenney v. Tuttle*, 1 Allen 185; *Hays v. Millar*, 77 Pa. St. 238; 18 Am. Rep. 445; *Hall v. Snyder*, 44 Mich. 318; *Dunhorn v. Rackliff*, 71 Me. 345.

11, *Tenney v. Tuttle*, 1 Allen 185.

12, See cases above cited.

§ 148. **Qualifications of the rule—Libel and slander.**—Although in civil actions evidence of character is not admissible to sustain the cause of action or defeat a re-

covery, there is a class of actions in which, from the nature of the issue, evidence of character is relevant as to the *measure of damages*. Perhaps this is most frequently illustrated in actions for *slander or libel*. Lord Ellenborough long since tersely stated the doctrine which still prevails: "Certainly a person of disparaged fame is not entitled to the same measure of damages with one whose character is unblemished, and it is competent to show that by evidence."¹ But in such cases the evidence must be confined to the *general reputation* of the plaintiff; and such reputation can not be shown by specific instances of his misconduct. "Character grows out of special acts, but is not proved by them. Indeed, special acts do very often indicate frailties and vices that are altogether contrary to the character actually established; and sometimes the very frailties that may be proved against a man may have been regarded by him in so serious a light as to have produced great improvement of character."² Thus where slanderous words charged a physician with a want of skill, it was held inadmissible to show by way of mitigation specific instances of malpractice.³

1, — v. Moore, 1 Maule & S. 284.

2, Frasier v. Pennsylvania Ry. Co., 38 Pa. St. 104; 80 Am. Dec. 467, 469; Andrews v. Vanduzer, 11 Johns. 38; Dewit v. Greenfield, 5 Ham. (Ohio) 225; Lamos v. Snell, 6 N. H. 413; 25 Am. Dec. 468; Wilson v. Noonan, 35 Wis.

321; *Burke v. Miller*, 6 Blackf. (Ind.) 155; *Thibault v. Sessions*, 101 Mich. 279; *Freeman v. Price*, 2 Bailey (S. C.) 115; *Ridley v. Perry*, 16 Me. 21; *Matthews v. Davis*, 4 Bibb (Ky.) 173; *Sanford v. Rowley*, 93 Mich. 119; *Parkhurst v. Ketchum*, 6 Allen 406; 83 Am. Dec. 639; *Jones v. Duckow*, 87 Cal. 109; *Hanners v. McClelland*, 74 Iowa 318.

3, *Swift v. Dickerman*, 31 Conn. 285. In an action for slander other instances of perjury cannot be submitted to the jury from which they are to make an estimate of the plaintiff's character, *Luther v. Skeen*, 8 Jones (N. C.) 356. In an action for slander proof that others spoke the same words, that the report was current, is not admissible in mitigation of damages, *Anthony v. Stephens*, 1 Mo. 254; 13 Am. Dec 497 and note.

§ 149. **Same—Nature of proof—Pleadings—Rumors.**—There has been some conflict as to the latitude which should be given to the inquiry in cases of libel and slander. It has sometimes been held that evidence of the plaintiff's bad reputation is incompetent; and that the inquiry should be limited to his general reputation as to the subject matter referred to in the slanderous words.¹ But there are instances where, from the necessity of the case, the inquiry to be of any value should be less restricted; and in such cases it has been held proper to admit evidence as to the general bad reputation of the plaintiff in the community as a man of *worth or integrity*.² Under the former system of pleading proof of the reputation of the plaintiff before and at the time of publication could be given in mitigation under the general issue;³ and it

has been held under the reformed procedure that, while in general mitigating circumstances must be *pecially pleaded*, the bad reputation of the plaintiff may be proved under the general denial. This is on the theory that a party must always be prepared to sustain his general reputation when it is in issue.⁴ So it is presumed that he will always be able to defend his character in reference to that matter wherein he alleges it to have been wrongfully assailed.⁵ There is no little conflict of opinion as to whether in mitigation of damages the defendant in such actions may prove other reports or *rumors* of a nature to raise a belief in his mind that the statements were true. On the one hand it is urged that the rumors themselves may have originated in slander and that character could not be protected if the defendant could defend himself or reduce the damages on the ground that he only gave more publicity and added the weight of his character to a calumny originated by others. It is also urged that the admission of such evidence renders it easy, by collusion in procuring such rumors, to deprive the plaintiff of any possible mode of redress.⁶ On the other hand it is urged in those cases, which allow such evidence, that one who only gives currency to a report already in existence is not generally guilty of the same degree of malignity and does not cause so great an injury as one who

is the prime author of the scandal.⁷ Although perhaps by the weight of authority this class of evidence is held inadmissible, there is certainly much force in the reasoning of the cases which hold that the prevalence of general rumors of the character of those uttered by the defendant is relevant as bearing both on the question of punitive and compensatory damages. This is especially true in those cases where the reports or suspicions of the plaintiff's guilt have become so general as to affect his general character; and perhaps a distinction should be made between evidence of *special rumors* and evidence of *general belief* and suspicion in the community that the plaintiff was guilty of the charge made.⁸ Where the defendant at the time of publishing or repeating the charge, names the person or persons from whom he has received the information, it has been held that he may show in mitigation that the sources of his information were as stated.⁹ But the defendant can not show for the purpose of rebutting the charge of malice the prevalence of reports similar to those repeated by him, unless he shows that such reports were *known and believed by him* at the time of uttering the slanderous words.¹⁰

1, Wilson v. Noonan, 27 Wis. 598. On charge of larceny it was held that it was incompetent to prove the plaintiff's reputation as a common prostitute, Douglass v. Towsey, 2 Wend. 352; 20 Am. Dec. 616 and note.

2, *Stone v. Varney*, 7 Met. 86; 39 Am. Dec. 762 and note, libel case, imputing "cruelty to a child;" *Leonard v. Allen*, 11 Cush. 241, slander case, imputing arson; *Sayre v. Sayre*, 1 Dutch. (N. J.) 235; *Lamos v. Snell*, 6 N. H. 413; 25 Am. Dec. 468; *Sawyer v. Eifert*, 2 Nott & McC. (S. C.) 511; 10 Am. Dec. 633.

3, *Stone v. Varney*, 7 Met. 86; 39 Am. Dec. 762; *Hamer v. McFarlin*, 4 Den. 509.

4, *Wilson v. Noonan*, 35 Wis. 321; *B—— v. I——*, 22 Wis. 372; 94 Am. Dec. 604 and note.

5, *Clark v. Brown*, 116 Mass. 504.

6, *Bodwell v. Swan*, 3 Pick. 376; *Anthony v. Stephens*, 1 Mo. 254; 13 Am. Dec. 497 and note; *Moberly v. Preston*, 8 Mo. 462; *Scott v. McKinnish*, 15 Ala. 662; *Dame v. Kenney*, 25 N. H. 318; *Pellet v. Sargent*, 36 N. H. 496; *Alderman v. French*, 1 Pick. 1; 11 Am. Dec. 114 and note; *Peter-son v. Morgan*, 116 Mass. 350; *Morey v. Morning Journal*, 123 N. Y. 207; *Knight v. Foster*, 39 N. H. 576; *Young v. Bennett*, 4 Scam. (Ill.) 43; *Sheham v. Collins*, 20 Ill. 325; *Wilson v. Fitch*, 41 Cal. 363; *Chamberlain v. Vance*, 51 Cal. 75; *Pease v. Shippen*, 80 Pa. St. 513; 21 Am. Rep. 116; *Haskins v. Lumsden*, 10 Wis. 359; *Mahoney v. Belford*, 132 Mass. 393.

7, *Calloway v. Middleton*, 2 A. K. Marsh. (Ky.) 372; 12 Am. Dec. 409; *Cook v. Barkeley*, 1 Pen. (N. J.) 169; 2 Am. Dec. 343; *Treat v. Browning*, 40 Conn. 408; 10 Am. Dec. 156 and note; *Easterwood v. Quin*, 2 Brev. (S. C.) 64; 3 Am. Dec. 700; *Case v. Marks*, 20 Conn. 248; *Morris v. Barker*, 4 Har. (Del.) 520; *Alderman v. French*, 1 Pick. 1; 11 Am. Dec. 114 and note. See article, 33 Cent. Law Jour. 379.

8, *Bowen v. Hall*, 20 Vt. 232; *Gray v. Ellzroth*, (Ind. App.) 37 N. E. Rep. 551 and cases cited. See cases cited above.

9, *Heilman v. Shanklin*, 60 Ind. 424; *Young v. Slemons*, *Wright* (Ohio) 124; *Evans v. Smith*, 5 T. B. Mon. (Ky.) 363; 17 Am. Dec. 74 and note. *Rex v. Burdett*, 4 Barn. & Ald. 95; *Mullett v. Hulton*, 4 Esp. 248; *Hunt v. Algar*, 6 Car. & P. 245; *Story v. Early*, 86 Ill. 461; *Galloway v. Courtney*, 10 Rich. (S. C.) 414; *Bennett v. Bennett*, 6 Car. & P. 588; *Mills*

v. Spencer, Holt N. P. 533; Williams v. Greenwade, 3 Dana (Ky.) 432; Edwards v. Kan. City Times, 32 Fed. Rep. 813.

10, Hatfield v. Lasher, 81 N. Y. 246; Hastings v. Stetson, 130 Mass. 76; Larrabee v. Minnesota Tribune Co., 36 Minn. 141.

§ 150. Character — Actions for breach of promise of marriage.—In actions for breach of promise of marriage the bad character of the plaintiff is clearly in issue. If the plaintiff has been guilty of criminal intercourse with another, and such fact is unknown to the defendant at the time of the contract, he may prove it as a defense.¹ The same is true if without his fault she becomes unchaste after the promise;² and if without the fault of the defendant the plaintiff by her subsequent indelicate conduct injures her reputation, this may be shown in mitigation of damages.³ So if the plaintiff prior to the promise was a person of poor character, this fact is relevant in mitigation of damages.⁴ But if she has been first seduced by the defendant under promise of marriage, he cannot be heard to prove her bad character. The rule was thus stated by a learned judge: "It appears from the declaration in this case, that the plaintiff had been seduced by the defendant and that pregnancy was the consequence of the seduction. This, of itself, would degrade her in the estimation of the public; and the defendant wishes to avail himself of this degradation, a consequence of

his own misconduct, to avoid the plaintiff's action or to reduce the sum she may recover in damages. No argument can show the absurdity of such a proposal in a stronger light than the bare statement of it." ⁵

1, Johnson v. Caulkins, 1 Johns. Cas. (N. Y.) 116; 1 Am. Dec. 102; Boynton v. Kellogg, 3 Mass. 189.

2, Palmer v. Andrews, 7 Wend. 142, citing Boynton v. Kellogg, 3 Mass. 189.

3, Palmer v. Andrews, 7 Wend. 142.

4, Palmer v. Andrews, 7 Wend. 142; Boynton v. Kellogg, 3 Mass. 189. When proof of character is admissible, latitude as to time is allowed, Rathburn v. Ross, 46 Barb. 133.

5, Boynton v. Kellogg, 3 Mass. 189.

§151. Same — Seduction and criminal conversation.—In actions for seduction and criminal conversation the character of the woman seduced is in issue. In such actions one element of damage is the wounded sensibility of the injured party, and another is the loss of society of the daughter or wife. Hence the damage is manifestly less if the daughter or wife was a person of disparaged fame before the wrong.¹ In such cases evidence is admissible not only of general bad character for chastity, but of *specific acts* of intercourse with other men,² even though such former acts of unchastity were not known to the defendant or to the public.³ In actions of this kind it has been held that the bad *character of the husband or father*,

bringing the action, is relevant to the issue when it affects him in his marital relations or in the character in which he sues.⁴ But in other cases, in actions for seduction brought by the father, such evidence has been rejected. In rendering a decision upon this subject a judge of the court of appeals of New York used the following language: "But to justify evidence of bad reputation in general or in a particular respect, it must first be shown that the sensibilities of such a parent are less acute and that the society and affections of a virtuous daughter are to him less valuable than to other men. This cannot be affirmed in fact, and there is no such presumption in law."⁵

1, *Carder v. Forehand*, 1 Mo. 704; 14 Am. Dec. 317 and note; *White v. Murtland*, 71 Ill. 250; 22 Am. Rep. 100. See note, 25 Am. Dec. 422.

2, *Love v. Masoner*, 6 Baxt. (Tenn.) 24; 32 Am. Rep. 522; *White v. Murtland*, 71 Ill. 250; 22 Am. Rep. 100; *Smith v. Milburn*, 17 Iowa 30; *Torre v. Summers*, 2 Nott & McC. (S. C.) 267; 10 Am. Dec. 597; *Harter v. Crill*, 33 Barb. 283; *Sanborn v. Neilson*, 4 N. H. 501; *Clouser v. Clapper*, 59 Ind. 548; *Conway v. Nicol*, 34 Iowa 533, all of which are actions for seduction or criminal conversation.

3, *Love v. Masoner*, 6 Baxt. (Tenn.) 24; 32 Am. Rep. 522; *Verry v. Watkins*, 7 Car. & P. 308.

4, *Harrison v. Price*, 22 Ind. 165; *Norton v. Warner*, 9 Conn. 172.

5, *Dain v. Wyckoff*, 18 N. Y. 45; 7 N. Y. 191; 72 Am. Dec. 493 and note; *Robinson v. Burton*, 5 Har. (Del.) 355.

§ 152. Same—Actions for bastardy.—It has sometimes been held relevant to prove

the bad reputation of the prosecutrix for chastity in actions for bastardy.¹ But the better rule is that such testimony is inadmissible. In such cases the very nature of the proceeding is at least to some extent an admission of unchastity on the part of the prosecutrix; and the testimony of witnesses as to her general character would only divert attention from the principal question to be tried.² For similar reasons it is irrelevant in such actions to prove the reputation of the prosecutrix as a common prostitute.³ Of course, like that of any other witness, the reputation of the prosecutrix for truth and veracity may be impeached; and evidence is relevant which tends to show that, at or about the time the child was begotten, she had sexual intercourse with some other person than the accused.⁴

1, *Short v. State*, 4 Harr. (Del.) 568; *Sword v. Nestor*, 3 Dana (Ky.) 452.

2, *Rawles v. State*, 56 Ind. 433; *Spevis v. Forrest*, 15 Vt. 435; *Com. v. Moore*, 3 Pick. 194; *Olson v. Peterson*, 33 Neb. 358.

3, *Morse v. Pineo*, 4 Vt. 281; *Sidelinger v. Bucklin*, 64 Me. 371; *Duffries v. State*, 7 Wis. 672; *Com. v. Churchill*, 11 Met. 538; 45 Am. Dec. 229 and note.

4, *State v. Reed*, 45 Iowa 469; *Falls v. Overseers*, 3 Munf. (Va.) 495; *Walker v. State*, 6 Blackf. (Ind.) 1; *Goodwine v. State*, 5 Ind. App. 63.

§ 153. Character in actions for fraud.—

The doctrine has been announced in a few cases that, if a party is charged with fraud

or other act involving moral turpitude and the charge is based only on circumstantial evidence, he may rebut the charge by proof of his good character.¹ Said Mr. Greenleaf: "And generally in actions of tort, wherever the defendant is charged with fraud from mere circumstances, evidence of his general good character is admissible to repel it."² But this view is contrary to the clear weight of authority and does not seem to be based upon any recognized principle of the law of evidence. Instances are constantly arising, both in actions in tort and contract, where the motives of parties are called in question; but this fact does not, in any legal sense, render the general character of such parties relevant to the issue. It is a far safer rule that, in conformity to general rules of evidence in civil cases, each transaction should be ascertained by its own circumstances and not by the character of the parties.³

1, *Henry v. Brown*, 2 Heisk. (Tenn.) 213; *State v. Beebe*, 17 Minn. 241; *Townsend v. Graves*, 3 Paige 455; *Walker v. Stephenson*, 3 Esp. 284; *Ruan v. Perry*, 3 Caines (N. Y.) 120 (overruled in later cases).

2, Greenl. Ev. sec. 54.

3, See cases cited below.

§ 154. Same, continued. — The view stated in the last section is that which now prevails and many illustrations might be given in which such evidence has been held

inadmissible, although fraud or other misconduct is imputed. This evidence has been held irrelevant in actions for robbery,¹ in actions to set aside the probate of a will on the ground of fraud,² in an action on an insurance policy, when the defense was overvaluation³ or the fraudulent burning of the property,⁴ for false representation as to the solvency of another⁵ or in incurring a debt or other obligation,⁶ for maliciously burning property⁷ and for assault and battery with a dangerous weapon.⁸ So such evidence has been held irrelevant in civil actions involving a charge of embezzlement,⁹ malicious mischief,¹⁰ fraudulent conveyance or other fraud on creditors;¹¹ as well as in actions for criminal conversation,¹² malicious prosecution,¹³ divorce on the ground of adultery¹⁴ and in an action where the imputation was the fraudulent appropriation of property and dishonesty in accounting for sales.¹⁵ In many of the cases above cited the evidence was circumstantial in its nature and it is evident that in many of them the charges of fraud or other misconduct were so serious, if believed, as to seriously affect the reputation of the litigants. To some extent the reputation of parties is liable to be affected by any litigation; but this is not the ground on which evidence of character is held material in such actions as slander, seduction and others which have already been referred to. Other objections to the

class of evidence under discussion were well stated in a South Carolina case: "If in every case where an act of dishonesty is imputed the imputation may be met by such evidence, then there are few cases into which such evidence might not be introduced; trials would be insupportably tedious and the result of a trial would as often depend upon the popularity of a party as upon the merits of his case."¹⁶ It may be added that since the general adoption of the rule allowing witnesses to testify fully in their own behalf, there is even less reason than formerly for admitting testimony of this class.

- 1, *Morris v. Hazelwood*, 1 Bush (Ky.) 208.
- 2, *Potter v. Webb*, 6 Greenl. (Me.) 14.
- 3, *Fowler v. Ætna Ins. Co.*, 6 Cow. 673; 16 Am. Dec. 460.
- 4, *Schmidt v. New York Ins. Co.*, 1 Gray 529. *Contra*, *Spears v. International Ins. Co.*, 1 Baxt. (Tenn.) 370.
- 5, *Gosgh v. St. John*, 16 Wend. 646.
- 6, *Dudley v. McCluer*, 65 Mo. 241; 27 Am. Rep. 273.
- 7, *Barton v. Thompson*, 56 Iowa 571; 41 Am. Rep. 119 and note; *Gebhart v. Burkett*, 57 Ind. 378; 26 Am. Rep. 61.
- 8, *Porter v. Seiler*, 23 Pa. St. 424. See also *Sowell v. McDonald*, 58 Miss. 251.
- 9, *White v. McKee*, 37 Vt. 161.
- 10, *Thayer v. Boyle*, 30 Me. 475.
- 11, *Church v. Drummond*, 7 Ind. 17.
- 12, *Pratt v. Andrews*, 4 N. Y. 493, as to character of the wife, but it was intimated that such evidence may be given if the character is attacked on cross-examination.

13, *Rogers v. Lamb*, 3 Blackf. (Ind.) 155; *Baker v. Hopkins*, 1 A. K. Marsh. (Ky.) 587.

14, *Humphrey v. Humphrey*, 7 Conn. 116. *Contra*, *O'Bryan v. O'Bryan*, 13 Mo. 16; 53 Am. Dec. 128.

15, *Smets v. Plunket*, 1 Strob. (S. C.) 372.

16, *Smets v. Plunket*, 1 Strob. (S. C.) 372.

§ 155. **Character—Actions for malicious prosecution.**—In actions for malicious prosecution it is relevant for the defendant to show that he had probable cause for the prosecution he commenced, and also that he acted without malice. As bearing on both of these questions and also in mitigation of damages, he may show the ~~general~~ bad reputation of the plaintiff.¹ And although the prevalence of reports that the plaintiff in the action for malicious prosecution had committed the offense charged would not alone justify a proceeding against him, yet the existence of such reports in the community and the fact that they were known and believed by the defendant may be shown as tending to prove his prudence and good faith.² But on obvious grounds the defendant cannot in such cases prove other specific offenses on the part of the plaintiff.³ There is high authority for the view that in actions for malicious prosecution of a *criminal action* the plaintiff may in the first instance prove his own good character. This is an exception to the general rule that in civil cases proof of good character cannot be received until it is attacked;

and such testimony is deemed relevant in such cases as bearing directly on the issue of probable cause.⁴

1, *Roderiguez v. Tadmire*, 2 Esp. 721; *Bacon v. Towne*, 4 Cush. 217; *Barron v. Mason*, 31 Vt. 189; *Gregory v. Chambers*, 78 Mo. 294. But in this last case it is doubted whether such evidence is relevant to the question of probable cause. See also *Eschbach v. Hurtt*, 47 Md. 61.

2, *Pullen v. Glidden*, 68 Me. 559; *Barron v. Mason*, 31 Vt. 189.

3, *Tillotson v. Warner*, 3 Gray 574; *Sutton v. McConnell*, 46 Wis. 269.

4, *McIntire v. Levering*, 148 Mass. 546; *Woodworth v. Mills*, 61 Wis. 44; *Blizzard v. Hays*, 46 Ind. 166; *Israel v. Brooks*, 23 Ill. 575; *Miller v. Brown*, 3 Mo. 127.

§ 156. Proof of good character.— Upon the principles already stated, it is evident that in civil actions it is generally irrelevant to show the good character of either party. In most of the cases where the proof of the bad character of the plaintiff is allowed, it is only in mitigation of damages. There is no such ground for admitting testimony of good character. It has indeed been sometimes held that when the *character is attacked by cross-examination*, imputing misconduct or by proof of specific acts of misconduct, his good character becomes involved and may be shown as part of the main case or defense.¹ The doctrine has even been maintained that in actions for slander and libel the plaintiff's character is put in issue by the very nature of the proceeding; that the plaintiff need not await the

movement of the defendant, but may in the first instance prove his good character whether it is attacked or not;² but by the weight of authority and the better reasoning, such evidence should not be received unless the reputation has been attacked by general evidence of bad character in those actions where character is in issue. The law presumes the character of a party to be good until the contrary is shown and he can safely rest on that presumption.³

1, *Sheehy v. Cokley*, 43 Iowa 183; 22 Am. Rep. 236; *Williams v. Haig*, 3 Rich. L. 362; 45 Am. Dec. 774; *Bennett v. Hyde*, 6 Conn. 24; *Adams v. Lawson*, 17 Grat. (Va.) 258; 94 Am. Dec. 455 and note; *Shroyer v. Miller*, 3 W. Va. 158; *Sample v. Wynn*, Busb. (N. C.) 319; *Romayne v. Duane*, 3 Wash. C. C. 246; *Williams v. Greenwade*, 3 Dana (Ky.) 432; *King v. Waring*, 5 Esp. 13; *Rogers v. Clifton*, 3 Bos. & P. 583; *Burton v. March*, 6 Jones (N. C.) 409. See also note, 14 Am. St. Rep. 480. As to good character in malicious prosecution see last section.

2, *Earl of Leicester v. Walter*, 2 Camp. 251; *Larned v. Buffinton*, 3 Mass. 546; 3 Am. Dec. 185; *Stone v. Varney*, 7 Met. 86; 39 Am. Dec. 762 and note; *Burnett v. Simpkins*, 24 Ill. 264; *Miller v. Miller*, 3 W. Va. 161; *Adams v. Lawson*, 17 Gratt. (Va.) 250; 94 Am. Dec. 455 and note; *Williams v. Haig*, 3 Rich. L. (S. C.) 362; 45 Am. Dec. 774 and note. See note, 13 Am. Dec. 499. Contra, *Rhodes v. Ijames*, 7 Ala. 574; 42 Am. Dec. 604. See also *Houghtaling v. Kilderhouse*, 1 N. Y. 530.

3, *Cornwall v. Richardson*, Ryan & M. 305; *Matthews v. Huntley*, 9 N. H. 146; *Stow v. Converse*, 3 Conn. 325; 8 Am. Dec. 189; *Miles v. Vanhorn*, 17 Ind. 245; 79 Am. Dec. 477; *Houghtaling v. Kilderhouse*, 2 Barb. 149; 1 N. Y. 530; *Gough v. St. John*, 16 Wend. 646; *Lamagdelaine v. Tremblay*, 162 Mass. 339; *Anderson v. Long*, 10 Serg. & R. (Pa.) 55; *Hitchcock v. Moore*, 70 Mich. 112; 14 Am. St. Rep. 474, and cases there cited in the decision and in the note. See also Townsh. Sland. & Lib. secs. 313, 314, 387.

§ 157. **Proof of financial standing — Exemplary damages.**— We have seen that in exceptional cases character becomes relevant in civil actions; and that generally, when admitted, such evidence is received to affect the measure of damages. Under ordinary circumstances the financial situation and standing of the parties are wholly irrelevant. The amount of damages depends upon the terms of the contract or, in action of tort, upon other circumstances wholly independent of the wealth or poverty of the parties;¹ but it is well settled that there is a class of cases in which the wealth of the defendant becomes a material fact, which may be proved on the question of the amount of damages. For example, in those cases where *exemplary* or *punitive* damages are allowed, this testimony becomes relevant on the ground that a verdict, which might sufficiently punish one of limited means, would seem insignificant to a defendant having a large fortune.² On this ground proof of the financial standing of the defendant has been received in actions for slander and libel,³ assault and battery,⁴ malicious prosecution,⁵ seduction,⁶ criminal conversation,⁷ negligence and trespass.⁸

1, *Myers v. Malcom*, 6 Hill 292; 41 Am. Dec. 744 and note; *Kniffen v. McConnell*, 30 N. Y. 285. On the general subject of this section see note, 67 Am. Dec. 562-568.

2, See the cases cited below. But a different rule prevails in Iowa, *Hunt v. Chicago & N. W. Ry. Co.*, 26 Iowa 364; *Guengerech v. Smith*, 34 Iowa 348. To the point that

the defendant can offer proof on the same subject, though the plaintiff does not, see *Johnson v. Smith*, 64 Me. 553.

3, *Hayner v. Cowden*, 27 Ohio St. 292; 22 Am. Rep. 303; *McAlmont v. McClelland*, 14 Serg. & R. (Pa.) 362; *Fry v. Bennett*, 4 Duer (N. Y.) 247; *Buckley v. Knapp*, 48 Mo. 152; *Burckhalter v. Coward*, 16 S. C. 435; *Larned v. Bufinton*, 3 Mass. 546; 3 Am. Dec. 185. Contra, *Palmer v. Haskins*, 28 Barb. 90.

4, *Rowe v. Moses*, 9 Rich. L. (S. C.) 423; 67 Am. Dec. 560 and note; *Brown v. Evans*, 8 Sawy. (U. S.) 488; 17 Fed. Rep. 912; *Jones v. Jones*, 71 Ill. 562; *Johnson v. Smith*, 64 Me. 553; *Gaither v. Blowers*, 11 Md. 536; *Sloan v. Edwards*, 61 Md. 89; *Bell v. Morrison*, 27 Miss. 68; *Harris v. Marco*, 16 S. C. 575; *Birchard v. Booth*, 4 Wis. 67; *Brown v. Swineford*, 44 Wis. 282; 28 Am. Rep. 582.

5, *Whitefield v. Westbrook*, 40 Miss. 311; *Winn v. Peckham*, 42 Wis. 493; *Bump v. Betts*, 23 Wend. 85.

6, *Rea v. Tucker*, 51 Ill. 110; 99 Am. Dec. 539 and note; *McAulay v. Birkhead*, 13 Ired. (N. C.) 28; 55 Am. Dec. 427; *Herring v. Jester*, 2 Houst. (Del.) 66; *Robin-on v. Burton*, 5 Harr. (Del.) 335; *Clem v. Holmes*, 33 Gratt. (Va.) 722; 36 Am. Rep. 793; *Grable v. Margrave*, 3 Scam. (Ill.) 372; 38 Am. Dec. 88. Contra, *Dain v. Wycoff*, 7 N. Y. 191.

7, *Rea v. Tucker*, 51 Ill. 112; 99 Am. Dec. 539 and note; *Peters v. Lake*, 66 Ill. 206; 16 Am. Rep. 593.

8, *McBride v. McLaughlin*, 5 Watts (Pa.) 375, malicious prosecution; *Meibus v. Dodge*, 38 Wis. 300; 20 Am. Rep. 6, injury caused by a dog.

§ 158. Same—Compensatory damages. Evidence of the wealth or standing of the defendant is sometimes relevant for the purpose of determining *compensatory* damages. This is for the reason that the financial standing of the defendant is one of the elements contributing to his influence in society; and there are injuries which are aggravated or

increased by the fact that the persons responsible for them are persons of rank or influence. "So far as the cause of action rests upon an injury to the character or an insult to the person, compensatory damages may be increased by proof of the wealth of the defendant. This is upon the ground that wealth is an element which goes to make up his rank and influence in society, and thereby renders the injury or insult resulting from his wrongful acts the greater."¹ On this principle evidence of the financial standing of the defendant has been received in actions for *seduction*.² And in the case of *slander or libel* it is very clear that the degree of the injury to the plaintiff may largely depend upon the financial and social standing of the defendant.³ In actions for *breach of promise of marriage* the participation in the home and property of the defendant is among the things of which the plaintiff by the breach of contract is deprived; hence evidence of the defendant's financial standing is admissible as affording some standard by which to estimate the plaintiff's disappointment and the extent of the loss.⁴

1, Johnson v. Smith, 64 Me. 555.

2, Grable v. Margrave, 3 Scam. (Ill.) 372; 38 Am. Dec. 88; Wilson v. Shepler, 86 Ind. 275; McAulay v. Birkhead, 13 Ired. (N. C.) 28; 55 Am. Dec. 427; Lavery v. Crooke, 52 Wis. 612; 38 Am. Rep. 768.

3, Bennett v. Hyde, 6 Conn. 24; Hosley v. Brooks, 20 Ill. 115; Humphries v. Parker, 52 Me. 507; Stanwood v.

Whitmore, 63 Me. 209; Shute v. Barrett, 7 Pick. 82; Lewis v. Chapman, 19 Barb. 252. See note, 67 Am. Dec. 565. Contra, Guengerech v. Smith, 34 Iowa 348.

4, James v. Biddington, 6 Car. & P. 590; Reed v. Clark, 47 Cal. 194; Hunter v. Hatfield, 68 Ind. 416; Lawrence v. Cook, 56 Me. 187; 96 Am. Dec. 443; Miller v. Rosier, 31 Mich. 475; Bennett v. Beam, 42 Mich. 346; 36 Am. Rep. 442 and note; Allen v. Baker, 86 N. C. 91; 41 Am. Rep. 444; Horam v. Humphreys, Lofft 80; Holloway v. Griffith, 32 Iowa 409; 7 Am. Rep. 208; Royal v. Smith, 40 Iowa 615. See extended review of the authorities in 63 Am. Dec. 545-47.

§159. Same—Financial standing of plaintiff.—In those actions in which only compensatory damages are allowed, the financial standing of the plaintiff is irrelevant. For example, evidence cannot be received in an action for negligence against a railroad company that the plaintiff is of limited means, and that since the injury he has not been able to support his family. The evidence should be confined to the plaintiff and to his capacity for business and to the nature of his injuries and the probability of recovery. The damages in such cases are not at all dependent upon his condition as to wealth or poverty.¹ But in those actions where *exemplary* damages are awarded proof is allowed not only of the condition in life and of the circumstances of the defendant, but also of those of the plaintiff. Although in some of the decisions asserting this rule the expressions of opinion are *obiter* and in others the reasons

assigned are not very satisfactory, yet the doctrine is supported by much authority.ⁿ Thus evidence of the circumstances and financial standing and rank in life of the plaintiff has been allowed in actions for *assault and battery*,³ *slander and libel*⁴ and *malicious prosecution*.⁵ In actions for *seduction* the rule is so far extended that proof may be given not only of the standing and rank of the plaintiff and of the person seduced, but as to the rank and standing of her family in the community.⁶ But in an Iowa case, where the plaintiff in the court below was permitted to show that she was a poor girl and had no means of support as well as other similar facts, the judgment was reversed.⁷ In actions of this nature it has been held admissible for the *defendant* in the first instance to offer proof of his financial condition to reduce damages on the ground that his pecuniary standing is a material element.⁸ The financial condition of the plaintiff may be shown in actions for *breach of contract of marriage*. In announcing this rule Judge Cooley used the following language: "When the suit is for the loss of a marriage and of an expected home, the fact that the plaintiff is without the means to provide an independent home for herself is not entirely unimportant. It may be supposed to be one of the facts which both parties had in mind in making their arrangements; and it is not improper that the jury should know of it also

and take it into account in making up their verdict." •

1, *Pennsylvania Ry. Co. v. Roy*, 102 U. S. 451; *Pitts Ry. Co. v. Powers*, 74 Ill. 343; *Chicago v. Brennan*, 65 Ill. 160; *Missouri Pac. Ry. Co. v. Lyde*, 57 Tex. 505; *Dreiss v. Frederick*, 70 Tex. 70; *Barbour v. Horn*, 48 Ala. 566.

2, See cases cited below.

3, *Sloan v. Edwards*, 61 Md. 69; *Gaithers v. Blowers*, 11 Md. 536; *Cochran v. Amor*, 16 Ill. 316; *McNamara v. King*, 2 Gilm. (Ill.) 432. See sec. 157 *supra*.

4, *McAlmont v. McClelland*, 14 Serg. & R. (Pa.) 363; *Clements v. Mahoney*, 55 Mo. 352; *Shufe v. Barrett*, 7 Pick. 82; *Larned v. Buffinton*, 3 Mass. 546. See sec. 157 *supra*.

5, *Bump v. Betts*, 23 Wend. 85. See sec. 157 *supra*.

6, *Wilson v. Sproul*, 3 Pa. 49; *Parker v. Monteith*, 7 Ore. 277; *McAulay v. Birkhead*, 13 Ired. (N. C.) 28; 55 Am. Dec. 427 and note; *Thompson v. Clendenning*, 1 Head (Tenn.) 287. But not of the individuals in the family, *Thompson v. Clendenning*, 1 Head (Tenn.) 287; general good character of the plaintiff and family are not admissible in absence of impeaching testimony on the part of the defense, *Haynes v. Sinclair*, 23 Vt. 108.

7, *West v. Druff*, 55 Iowa 335.

8, *Holliday v. Griffith*, 32 Iowa 409. Contra, *Wilbur v. Johnson*, 58 Mo. 600.

9, *Vanderpool v. Richardson*, 52 Mich. 336.

§ 160. Mode of proving financial standing.—The mode of proving the wealth of defendant for the purpose of increasing damages depends upon the question whether the damages to be allowed are *compensatory* or *exemplary* in their nature. In the former case the damages are enhanced by the reputa-

tion of the defendant as to his circumstances and standing; and therefore the evidence should relate to his *reputed wealth* and standing.¹ In the other case the inquiry should be as to his *actual* pecuniary ability; hence, the amount of his property should be stated by persons having knowledge of the subject.² It need hardly be added that counsel have no right to comment in their argument upon the wealth or poverty of a party in the absence of any evidence on the subject.³

1, *Stanwood v. Whitmore*, 63 Me 209; *Johnson v. Smith*, 64 Me. 555; *Kniffen v. McConnell*, 30 N. Y. 285.

2, *Sloan v. Edwards*, 61 Md. 101.

3, *Brown v. Swineford*, 44 Wis. 282; 28 Am. Rep. 582.

§ 161. **Relevancy of facts apparently collateral—Negligence cases.**—In actions for negligence the question often arises as to what extent facts apparently collateral to the issue may be received. For example in actions for *personal injury on a highway* it may become relevant to show, for the purpose of proving *notice* on the part of the municipality, that *other persons have received injuries* at the same place.¹ There is a class of decisions in which it is held that in suits for injuries caused by defective streets it is relevant for the plaintiff to prove other similar accidents for the purpose of showing the dangerous character of the street.² Although this view seems to be sustained by the

greater number of cases, it is open to the obvious objection that it permits the introduction of numerous collateral issues whereby the attention of the jury may be diverted from the main question. The contrary view has the support of very high authority and, in the opinion of the author, is sustained by the better reasoning.³ A similar conflict has arisen as to whether in actions against railroad companies, proof of other *similar accidents under similar conditions* may be received. In some cases of this character such evidence has been received,⁴ in others it has been rejected.⁵ It is not relevant to show that other persons have passed over the same walk or street without injury;⁶ nor that a crossing complained of is not different from other crossings of that character in the same city.⁷ So it is not relevant to show the condition of the ways in other parts of the county, or to show the *practice of towns or counties* in respect to them.⁸ Nor in an action against a railroad company is it relevant to show that accidents have not happened on other railroads under similar conditions;⁹ nor is it competent to prove the custom of other railroad companies as to keeping their turn-tables locked,¹⁰ or as to the blowing of whistles,¹¹ or as to the employment of watchmen for bridges.¹² But although a custom cannot be proved as an excuse for a negligent act, there are numerous cases in which, under peculiar

circumstances, usage has been held relevant to show what constitutes negligence or as bearing on the question of negligence in the given case.¹³ So when the question relates to the degree of care used at the time of a given accident, the evidence must be confined to that issue and it is irrelevant to show that the *party is ordinarily careful* or otherwise;¹⁴ although, in exceptional cases and contrary to the weight of authority, it has been held relevant to show former and similar acts of negligence for the purpose of proving the negligence alleged.¹⁵

1, District of Columbia v. Armes, 107 U. S. 519; Chicago v. Powers, 42 Ill. 169; Delphi v. Lower, 74 Ind. 520; 39 Am. Rep. 98; Smith v. Sherwood, 62 Mich. 159; Goshen v. England, 119 Ind. 368; Collins v. Dorchester, 6 Cush. 396; Richards v. Oshkosh, 81 Wis. 226; Phillips v. Willow, 70 Wis. 6; 5 Am. St. Rep. 114; Lombar v. Tawas, 86 Mich. 14; Osborne v. Detroit, 32 Fed. Rep. 36. Contra, Blair v. Pelham, 118 Mass. 421, an accident a year before; Mathews v. Cedar Rapids, 80 Iowa 459, nor even that defendant had had actual knowledge of prior accidents of same place.

2, District of Columbia v. Armes, 107 U. S. 519, 525; Augusta v. Hafers, 61 Ga. 48; 34 Am. Rep. 95; Kent v. Lincoln, 32 Vt. 591; Smith v. Sherwood, 62 Mich. 159; Darling v. Westmoreland, 52 N. H. 401; 13 Am. Rep. 55, elaborate discussion; Smith v. Des Moines, 84 Iowa 685; Lombar v. Tawas, 86 Mich. 14; Gillrie v. Lockport, 122 N. Y. 403; Osborne v. Detroit, 32 Fed. Rep. 36; Quinlan v. Utica, 11 Hun 217; 74 N. Y. 603; House v. Metcalf, 27 Conn. 631, proof that other horses had been frightened by same object allowed.

3, Richards v. Oshkosh, 81 Wis. 226; Dubois v. Kingston, 102 N. Y. 219; Collins v. Dorchester, 6 Cush. 396; Phillips v. Willow, 70 Wis. 6; 5 Am. St. Rep. 114; Mathews v. Cedar Rapids, 80 Iowa 459; Kidder v. Dunstable, 11

Gray 342; Parker v. Publishing Co., 69 Me. 173; 31 Am. Rep. 262; Elliot Roads & Streets 463, 646. As to admissibility of testimony as to subsequent repairs, see sec. 290 *infra*.

4, Hill v. Portland Ry. Co., 55 Me. 438; 92 Am. Dec. 601; Pittsburg Ry. Co. v. Ruby, 38 Ind. 294; Brady v. Manhattan Ry. Co., 127 N. Y. 46; Kelly v. Southern Minn. Ry. Co., 28 Minn. 98.

5, Hubbard v. Railway Co., 39 Me. 506; Hudson v. Chicago & N. W. Ry. Co., 59 Iowa 581; 44 Am. Rep. 692; Dye v. Delaware, L. & W. Ry. Co., 130 N. Y. 671.

6, McGrail v. Kalamazoo, 94 Mich. 52; Bauer v. Indianapolis, 99 Ind. 56; Branch v. Libbey, 78 Me. 321; 57 Am. Rep. 810 and note; Temp. Hall Ass'n v. Giles, 33 N. J. L. 260; Marvin v. New Bedford, 158 Mass. 464; Kidder v. Dunstable, 11 Gray 342. Contra, Calkins v. Hartford, 33 Conn. 57; 87 Am. Dec. 194; Smith v. Gilman, 38 Ill. App. 393.

7, Bauer v. Indianapolis, 99 Ind. 56.

8, Hinckley v. Barnstable, 109 Mass. 126; Kenworthy v. Iron-ton, 41 Wis. 647. But see Packard v. New Bedford, 9 Allen 200.

9, Louisville Ry. Co. v. Com., 80 Ky. 143; 44 Am. Rep. 468.

10, Koons v. St. Louis Ry. Co., 65 Mo. 592; G., C. & Santa Fe Ry. Co. v. Evansich, 61 Tex. 3.

11, Hill v. Portland Ry. Co., 55 Me. 438; 92 Am. Dec. 601.

12, Grand Trunk Ry. Co. v. Richardson, 91 U. S. 454.

13, Houston Ry. Co. v. Cowsen, 57 Tex. 293; Aldrich v. Monroe, 60 N. H. 118; Kolsti v. Minneapolis Ry. Co., 32 Minn. 133; Kelly v. Southern Minn. Ry. Co., 28 Minn. 98; Coates v. Burlington Ry. Co., 62 Iowa 486; Jeffrey v. Keokuk Ry. Co., 56 Iowa 546.

14, Thompson v. Bowie, 4 Wall. 463; Tenny v. Tuttle, 1 Allen 185; Gahagan v. Boston Ry. Co., 1 Allen 187; 79 Am. Dec. 724 and note; Robinson v. Fitchburg Ry. Co., 7 Gray

92; McDonald v. Savoy, 110 Mass. 49; Hatt v. Nay, 144 Mass. 186.

15, State v. Manchester Ry. Co., 52 N. H. 528.

§ 162. **Same, continued.**—The general rule does not exclude proof of the *habits* of *animals* when such habits become material. Such habits are held to be in their nature continuous and may be proved by successive acts of a similar kind.¹ Thus if it is material to show at the time of an accident that a horse had a habit of shying, instances may be proved of such shying both before and after the time of the accident.² Where the evidence was conflicting as to the rate of speed at which the plaintiff was driving his horse at the time of an accident, it was held relevant as tending to show the capacity of the horse for speed that before and after the accident he had been driving at a certain rate of speed on the race track.³ In several cases it has been vigorously contended that where the plaintiff seeks to prove that an object is calculated to frighten horses, it is relevant to show that on other occasions the *same object has frightened other horses*. This view has been urged on the grounds that actual experiment of this character affords satisfactory, if not the most satisfactory, proof of the real issue to be tried.⁴ On the other hand and by another line of authorities proof of this character is held to be excluded as collateral to the issue. It is open

to the same objections as the form of proof already mentioned—that of other accidents at the same place.⁵ In an action where it is claimed that the defendant is liable on account of the negligence of a servant, it is not relevant to show *specific acts of negligence on the part of such servant* not connected with the act in question.⁶ But when the general fitness and capacity of a servant are involved, his prior acts and conduct on specific occasions are relevant when it is proven that the principal had knowledge of such acts and when the principal is charged with negligence in retaining the servant.⁷

1, See cases next cited.

2, *Todd v. Rowley*, 8 Allen 51.

3, *Whitney v. Leominster*, 136 Mass. 25.

4, *Darling v. Westmoreland*, 52 N. H. 401; 13 Am. Rep. 55; *Crocker v. McGregor*, 76 Me. 282; 49 Am. Rep. 611.

5, *Cleveland Ry. Co. v. Wynant*, 114 Ind. 525; 5 Am. St. Rep. 644; *Bloor v. Delafield*, 69 Wis. 273.

6, *Michigan Cent. Ry. Co. v. Gilbert*, 46 Mich. 176, yardmaster; *Maguire v. Middlesex Ry. Co.*, 115 Mass. 239, car driver; *Baulec v. New York Ry. Co.*, 59 N. Y. 356; 17 Am. Rep. 325, switchman; *Warner v. New York Ry. Co.*, 44 N. Y. 465, flagman. Contra, *State v. Manchester Ry. Co.*, 52 N. H. 528.

7, *Baulec v. New York Ry. Co.*, 59 N. Y. 356; 17 Am. Rep. 325. See also, *Frazier v. Pennsylvania Ry. Co.*, 38 Pa. St. 104; 80 Am. Dec. 467.

§163. Relevancy of disconnected facts to show defective machinery — Railroad fires.—Where the negligence com-

plained of consists in the use by the defendant of machinery or other agencies alleged to be dangerous or unfit for use, it has frequently been found necessary to admit evidence of disconnected facts showing such unfitness. This has been often illustrated in cases against railroad companies for the setting of fires by means of engines. Since knowledge of the condition of such engines is confined for the most part to the agents of the company, it would often be difficult for the opposite party to prove their condition unless evidence of prior facts and circumstances should be received. Owing to the apparent necessities of the case, the courts seem to have somewhat relaxed the general rule, and they have in this class of cases received evidence that the same or other engines of similar construction on the same road had before or after the accident in question thrown out sparks or coals near the place in question.¹ After the plaintiff has refuted other probable causes evidence that engines were so managed near the location of the fire as to be likely to set on fire objects not more remote than the property burned not only renders it probable that the fire was set by the defendant's engine, but raises an inference that there was something improper in the construction or management of the engine which caused the fire.² But the presumption in such case is only *prima facie*, not conclusive,

and is of course subject to rebuttal by competent evidence.³

1, *Piggot v. Eastern Counties Ry. Co.*, 3 Man., G. & S. 230; 54 E. C. L. 229; *Henry v. Southern Pacific Ry. Co.*, 50 Cal. 176; *Webb v. Rome, W. & O. Ry. Co.*, 49 N. Y. 420; 10 Am. Rep. 389; *Longabaugh v. Virginia City & T. Ry. Co.*, 9 Nev. 271; *Philadelphia & R. Ry. Co. v. Schultz*, 93 Pa. St. 341; *Cleaveland v. Grand Trunk Ry. Co.*, 42 Vt. 449; *Annapolis & E. Ry. Co. v. Gantt*, 39 Md. 115; *Grand Trunk Ry. Co. v. Richardson*, 91 U. S. 454; *Ross v. Boston & W. R. Ry. Co.*, 6 Allen 87; *Spaulding v. Chicago & N. W. Ry. Co.*, 30 Wis. 110; *Smith v. Old Colony & N. Ry. Co.*, 10 R. I. 22; *St. Joseph & D. C. Ry. Co. v. Chase*, 11 Kan. 47; *Gandy v. Chicago & N. W. Ry. Co.*, 30 Iowa 420; 6 Am. Rep. 682. See note, 38 Am. Dec. 73-76. As to constitutionality of statutes making persons liable without respect to negligence, see *Campbell v. Missouri Pac. Ry. Co.*, 121 Mo. 340; 42 Am. St. Rep. 530 and note.

2, *Sheldon v. Hudson River Ry. Co.*, 14 N. Y. 218, 221; 67 Am. Dec. 155 and note. *Henderson v. Philadelphia & R. Ry. Co.*, 144 Pa. St. 461; *Thatcher v. Maine Cent. Ry. Co.*, 85 Me. 502.

3, *Chicago & A. Ry. Co. v. Juaintance*, 58 Ill. 389; *Toledo, W. & W. Ry. Co. v. Larmion*, 67 Ill. 68; *Kenny v. Hannibal & St. J. Ry. Co.*, 70 Mo. 243; *Libby v. Chicago, R. I. & P. Ry. Co.*, 52 Iowa 92.

§ 164. **Same, continued.**—The view has been maintained by very high authority that this evidence may be allowed without any proof of similarity in construction of the engines. This view rests on the theory that the business of running trains on a railroad presupposes a unity of management and a general similarity of the engines, and that the evidence in question tends to show a negligent habit of the officers and agents of the

corporation.¹ But the leading case supporting this view has been vigorously criticised; and the rule supported by the weight of authority and by the better reasoning is that where the engine alleged to have set the fire is not satisfactorily identified, it is competent for the plaintiff to sustain or strengthen the inference that the fire originated from the cause alleged by proving that the defendant's locomotives generally, or many of them, at or about the time of the occurrence threw sparks and kindled fires upon that portion of the road.² Of course the other facts relied on in such cases must not be so remote in time or place as not to lead to a fair inference that the same conditions still exist at the time and place under inquiry. But it has been held proper to receive such evidence as to former fires happening a considerable time before that in question.³

1, *Railroad Co. v. Richardson*, 91 U. S. 454; *Sheldon v. Railroad Co.*, 14 N. Y. 218; *Koontz v. Railway Co.*, (Ore.) 23 Pac. Rep. 820; *Field v. Railroad Co.*, 32 N. Y. 339; *Thatcher v. Maine Cent. Ry. Co.*, 85 Me. 502; *Webb v. Rome Ry. Co.*, 49 N. Y. 420; 10 Am. Rep. 389 and note.

2, *Henderson v. Philadelphia Ry. Co.*, 144 Pa. St. 461; *Railroad Co. v. Schultz*, 93 Pa. St. 344; *Albert v. Railroad Co.*, 98 Pa. St. 316; *Boyce v. Railroad Co.*, 43 N. H. 627; *Henry v. South Pacific Ry. Co.*, 50 Cal. 176; *Railroad Co. v. Stranahan*, 79 Pa. St. 405; *Cleveland v. Railroad Co.*, 42 Vt. 449; *St. Joe & D. C. Ry. Co. v. Chase*, 11 Kan. 47; *Thatcher v. Maine Cent. Ry. Co.*, 85 Me. 502; *Green Ridge Ry. Co. v. Brinkman*, 64 Md. 52; *Haskinson v. Central Ry. Co.*, 66 Vt. 618; *Gibbons v. Wisconsin Valley Road*, 58 Wis. 335; *Allard v. Chicago & N. W. R. R. Co.*, 73 Wis.

165; *Piggot v. Eastern Ry. Co.*, 3 Man., G. & S. 230. As to general subject, see extended note, 38 Am. Dec. 70; 2 Cent. Law Jour. 642, 643; 8 Am. & Eng. Ency. Law 7.

3, *Field v. New York Cent. Ry. Co.*, 32 N. Y. 339; *Sheldon v. Hudson River Ry. Co.*, 14 N. Y. 221; 67 Am. Dec. 155 and note; *Longabough v. Virginia City Ry. Co.*, 9 Nev. 271; *Henderson v. Philadelphia Ry. Co.*, 144 Pa. St. 461; *Thatcher v. Maine Cent. Ry. Co.*, 85 Me. 502.

§165. Facts apparently collateral — Value of lands.—The question has frequently arisen in the courts whether the values of lands can be shown by testimony as to actual sales of other lands in the neighborhood. It is very clear that the value of land may be shown by proving the market value and that the knowledge of the witness as to such market value may be based upon his knowledge of other sales; but it is urged that direct proof of other sales and of the prices paid gives to the agreements of such third parties the effect of evidence, without giving any opportunity for cross-examination to show that the price paid was inadequate or excessive. It is also objected that the reception of such evidence would lead to many *collateral issues* for which the respective parties could not be prepared. For these and other reasons, it has been held in some states that the values of land cannot be thus shown on direct examination by evidence as to particular sales of similar tracts;¹ but an entirely different rule is maintained in other states.² In those

jurisdictions where such evidence is admitted, the courts are agreed that the proof of other sales must be limited to those *in the vicinity*. In determining this question, however, the nature of the land must be taken into consideration. If the lands are thinly settled or are used for agricultural purposes, it might be proper to receive evidence of the sales of other lands several miles away; while if the lands were city lots, a distance of several blocks might render the evidence improper.³ It is equally clear that evidence of other sales should not be received if it appear that they were *too remote in point of time* to afford any aid in determining the real question in issue.⁴ In determining this question the court will consider whether or not the land is so situated that rapid changes have taken place in the value.⁵ It is another condition of the reception of such testimony that the other property should be *similar in character*. Thus it would be clearly incompetent, on the question of the values of farming lands, to prove the prices for which city property had been sold.⁶

1, Railroad Co. v. Hiester, 40 Pa. St. 53; Railroad Co. v. Bunnell, 81 Pa. St. 414; Railroad Co. v. Benson, 36 N. J. L. 557; Railroad Co. v. Ziemer, 124 Pa. St. 414; *In re* Thompson, 127 N. Y. 463; Railroad Co. v. Pearson, 35 Cal. 247.

2, Chicago Ry. Co. v. Maroney, 95 Ill. 179; Laffin v. Chicago Ry. Co., 33 Fed. Rep. 415; Patterson v. Boom Co., 3 Dill. (U. S.) 465 and note; Stevens v. Springer, 23 Mo

App. 375; *Gardner v. Brookline*, 127 Mass. 358; *Packing Co. v. Chicago*, 111 Ill. 651; *Railroad Co. v. Greely*, 23 N. H. 237; *Washburn v. Railroad Co.*, 59 Wis. 364; *Town of Cherokee v. Land Co.*, 52 Iowa 279.

3, *Paine v. Boston*, 4 Allen 168; *Cemetery Assn. v. Railroad Co.*, 121 Ill. 199; *Ham v. Salem*, 100 Mass. 350, evidence as to sale of ice privilege seven or eight miles distant held too remote, the issue being the value of a similar privilege.

4, *Hunt v. City of Boston*, 152 Mass. 168; *Everett v. Union Pacific Ry. Co.*, 59 Iowa 243, sales ten or twelve years before held too remote; *Gardner v. Brookline*, 127 Mass. 358, sales three or four years before admitted.

5, *Gardner v. Brookline*, 127 Mass. 358; *Benham v. Dunbar*, 103 Mass. 365; *Dietrichs v. Lincoln & N. W. Ry. Co.*, 12 Neb. 225; *Chandler v. Jamaica Pond Co.*, 122 Mass. 305. See also *Kerr v. Commissioners*, 117 U. S. 379.

6, *Cemetery Ass'n v. Railroad Co.*, 121 Ill. 199; *Patch v. Boston*, 146 Mass. 52, in this case testimony was held competent, although one piece of land had buildings while the other had not; *Sawyer v. Boston*, 144 Mass. 471, the lots need not be of the same size.

§ 166. Same, continued. — If testimony of this character is to be admitted at all, it is evident that while the conditions surrounding the different sales should be similar they need not be exactly the same. In those courts where such evidence is received, it is held to be very largely a question of judicial discretion whether the requisite similarity of conditions has been established.¹ And obviously the court in its discretion may so limit such testimony as to prevent the trial of too many collateral issues.² When testimony of this character is received, it is a

requisite, as already stated, that the lands should be shown to be similar in character, situation and value.³ It is also necessary that the witness should have *personal knowledge* of the other sales; hence mere hearsay or recitals in deeds of the consideration are not competent to prove the fact.⁴ Clearly evidence should not be received to prove what *offers* have been made to sell or what prices have been asked or refused;⁵ although it is obvious that the declarations of the party to the suit concerning the land in question, including offers to sell, may be received when such statements are in the nature of admissions.⁶ Nor is it admissible to prove the amount received by way of compromise or settlement on condemnation proceedings.⁷

1, Shattuck v. Railroad Co., 6 Allen 115; Sawyer v. Boston, 144 Mass. 471; Presbrey v. Railroad Co., 103 Mass. 1; Paine v. Boston, 4 Allen 168.

2, Amoskeag Co. v. Head, 59 N. H. 332.

3, See cases cited above.

4, Rose v. Taunton, 119 Mass. 99; Spaulding v. Knight, 116 Mass. 148; Esch v. Chicago, M. & St. P. Ry. Co., 72 Wis. 229.

5, Spring Valley Works v. Drinkhouse, 92 Cal. 528; Lehmick v. Railroad Co., 19 Minn. 464; Davis v. Charles River Ry. Co., 11 Cush. 506; Winnisimmet Co. v. Grueby, 111 Mass. 543; Montclair Ry. Co. v. Benson, 36 N. J. L. 557; Sherlock v. Railroad Co., 130 Ill. 403. Evidence as to the assessed valuation is not admissible, Anthony v. New York, P. & B. Ry. Co., 162 Mass. 60; nor as to the amount of assessments paid, Nelson v. Village of West Duluth, 55 Minn. 497.

6, Railroad Co. v. Andrews, 37 Kan. 641; Springfield v. Schmook, 68 Mo. 394; East Brandywine & W. Ry. Co. v. Ranck, 78 Pa. St. 454; Power v. Savannah, S. & S. Ry. Co., 56 Ga. 471.

7, Howard v. Providence, 6 R. I. 514; Railroad Co. v. McLaren, 47 Ga. 546; Bennett v. New Bedford Ry. Co., 110 Mass. 433; Springfield v. Schmook, 68 Mo. 394; Howe v. Howard, 158 Mass. 278.

§ 167. Proof of intent—Motives and belief.—It is evident that the most satisfactory mode of proving the motives or intent with which an act is done is to show the facts and circumstances accompanying the act. It is not relevant for a witness to state the motives or intentions of *another* person.¹ It is held in a few states that a party cannot state directly his own motives or intent. Since such testimony cannot be directly contradicted and because it must often be of little value, the proof must consist of the surrounding circumstances which illustrate the nature of the act.² But it is the prevailing rule, sustained by the great weight of authority, that whenever the motive, intention or belief of a person is relevant to the issue it is competent for such person to *testify directly upon that point*, whether he is a party to the suit or not. To state the rule in another form, when the motive of a witness in performing a particular act or in making a particular declaration becomes a material issue in a cause or reflects important light upon such issue, he may himself be sworn in

regard to it, notwithstanding the diminished credit to which his testimony may be entitled as coming from the mouth of an interested witness.³ It is hardly necessary to add that such testimony is *not conclusive* as against the facts and circumstances which tend to illustrate the motive or intent.⁴ It is an important qualification of the rule that testimony of this character should not be received to *change the import of a contract*, as to the terms of which there is no dispute, or in violation of the rule which forbids the admission of parol testimony to vary written instruments.⁵ The cases already cited show that the rule under discussion applies alike to civil and criminal cases.

1, Cihak v. Kleke, 117 Ill. 643; Manufacturers Bank v. Koch, 105 N. Y. 630.

2, McKown v. Hunter, 30 N. Y. 625; Alabama Co. v. Reynolds, 79 Ala. 497; McCormick v. Joseph, 77 Ala. 236; Whizenant v. State, 71 Ala. 383; Burke v. State, 71 Ala. 377; Wheles v. Rhodes, 70 Ala. 419; Bolen v. State, 26 Ohio St. 371; Haywood v. Foster, 16 Ohio 88.

3, As to fraud upon creditors, see Gardom v. Woodward, 44 Kan. 758; 21 Am. St. Rep. 314 and note; Seymour v. Wilson, 14 N. Y. 567; Wilson v. Clark, 1 Ind. App. 182; Stearns v. Gosselin, 58 Vt. 38; Watkins v. Wallall, 19 Mich. 57; Thacher v. Phinney, 7 Allen 146; Forbes v. Waller, 25 N. Y. 430; Snow v. Paine, 114 Mass. 520; as to fraud in chattel mortgage, Frost v. Rosecrans, 66 Iowa 405; as to good faith and knowledge in execution of papers, Frost v. Rosecrans, 66 Iowa 405; Thacher v. Phinney, 7 Allen 146; Phelps v. Georges Creek Co., 60 Md. 536; Thurston v. Cornell, 38 N. Y. 281; Perry v. Porter, 121 Mass. 522; as to malicious prosecution, Garrett v. Mannheimer, 24 Minn. 93; Heap v. Parrish, 104 Ind. 36; McKown v. Hunter, 30

N. Y. 625; as to intent in usury, *Thurston v. Cornell*, 38 N. Y. 281; as to exemplary damages in trespass, *Norris v. Marrill*, 40 N. H. 395; as to domicile, *Kennedy v. Ryall*, 67 N. Y. 379; *Lombard v. Oliver*, 7 Allen 155; *Fisk v. Chester*, 8 Gray 506; as to felonious assault, *Greer v. State*, 53 Ind. 420; *Kerrains v. People*, 60 N. Y. 221; 19 Am. Rep. 158; as to homicide, *State v. Harrington*, 12 Nev. 126; *Com. v. Woodward*, 102 Mass. 155; as to false pretenses, *Over v. Schiffing*, 102 Ind. 191; *People v. Baker*, 96 N. Y. 340; as to belief, *Atlanta Co. v. Beauchamp*, 93 Ga. 6; in assumpsit, *Delano v. Goodwin*, 48 N. H. 203; 97 Am. Dec. 601; as to libel, *Over v. Schiffing*, 102 Ind. 191. See also *Ross v. State*, 116 Ind. 495.

4. *People v. Farrell*, 31 Cal. 576; *Anderson v. Wehe*, 62 Wis. 402; *Wilson v. Noonan*, 35 Wis. 355; *Plank v. Grimm*, 62 Wis. 251; *Griffin v. Marquardt*, 21 N. Y. 121.

5. *Dillon v. Anderson*, 43 N. Y. 231; *Cake v. Pottsville Bank*, 116 Pa. St. 264; *Spencer v. Colt*, 89 Pa. St. 314; *Browne v. Hickie*, 68 Iowa 330; *Quimby v. Morrill*, 47 Me. 470; *Thomas v. Loose*, 114 Pa. St. 35.

§ 168. Evidence made relevant by that of the adverse party.—In determining whether questions are relevant or not the judge should take into consideration not only the issues as shown by the pleadings, but also the line of proof which has been resorted to by the respective parties. Testimony which would be clearly irrelevant or incompetent if offered by one party in the first instance may become very pertinent in *rebuttal* or explanation of evidence offered by the adversary. Perhaps this is most frequently illustrated by cases arising under the rule elsewhere discussed,—that where *parts of a conversation* or act or writing are proved,

other connected parts should be received.¹ In such cases, although a plaintiff might not in the first instance offer his own statements and thus make testimony in his own behalf, he may, if his statements are partially proved by the defendant's evidence, give the statement in full.² On the same general principle where testimony is adduced against a party which tends to raise an inference of some *improper motive* or conduct or when some act is shown which might be deemed prejudicial to his case, it may be relevant and important for him to give an explanation which might otherwise be clearly inadmissible.³ Thus if the testimony raises the inference that a party has made improper advances to a witness, the whole facts and the language used may be shown in explanation.⁴ If it is proved that a party has destroyed his account books he may state such reasons and facts as tend to repel the inference that they were destroyed from some improper motive.⁵ On the principle under discussion where a party introduces a witness who swears positively to an important fact and on full examination it appears that he can swear to this fact only as an *inference from the existence of another fact*, the other party may show that the pretended fact or practice so relied on as a basis of knowledge did not exist.⁶ So where testimony is admitted tending to show that the facts claimed by a party are a physical im-

possibility, specific facts may be proved showing the contrary.⁷ Where a party has himself produced fragmentary parts of confidential communications he so far surrenders the privilege that the other party may offer the remaining parts.⁸

1, *Rouse v. Whited*, 25 N. Y. 170; 82 Am. Dec. 337 and full note. See secs. 822, 874 *infra*.

2, See cross references and notes last cited.

3, *Edgell v. Francis*, 86 Mich. 232; *Mack v. State*, 48 Wis. 271; *Smith v. State*, 51 Wis. 615; *Mariotte v. Lieux*, 41 La. An. 528; *Merritt v. New York Ry. Co.*, 162 Mass. 326; *Foster's Executor v. Dickinson*, 64 Vt. 233; *Richmond Co. v. Gardner*, 91 Ga. 27, explaining absence of witnesses.

4, *Lynch v. Coffin*, 131 Mass. 311.

5, *Gage v. Cheseboro*, 49 Wis. 486.

6, *Wentworth v. Eastern Ry. Co.*, 143 Mass. 248.

7, *Ross v. Boston Ry. Co.*, 6 Allen 87; *Loring v. Worcester Ry. Co.*, 131 Mass. 469, the claim was that sparks from the engine could not reach the premises in question and proof was received that on a former occasion sparks from the same engine had fallen there.

8, *Western Union Tel. Co. v. Baltimore Tel. Co.*, 26 Fed. Rep. 55.

§169. Same — Rebuttal or explanation of irrelevant testimony.—If one party is allowed against objection to introduce irrelevant testimony, it is manifestly unjust to prevent the other party from rebutting or explaining such testimony.¹ There is, however, a class of decisions which hold that if the *irrelevant testimony* is *not objected to* by the party against whom it is offered, he has no

right to offer similar testimony against objection by way of explanation or rebuttal.² As the view has been stated, a party can not, by permitting irrelevant evidence to be introduced, rightfully claim that because of such fact similar evidence can be introduced by him.³ The court is not bound to receive irrelevant testimony even though both parties *consent*; ⁴ and where such testimony has been received without objection, it is not error for the court to exclude it from the consideration of the jury;⁵ and so where a party has offered irrelevant testimony without objection, he can not claim the right to introduce further evidence of the same kind to explain the former.⁶ There is a class of decisions which hold that where a party voluntarily offers testimony which is unnecessary or irrelevant to the issue, it is too late for him to object to rebutting testimony offered by the adversary upon the same subject, and that it should be received.⁷ There is another class of decisions which hold that the introduction or exclusion of immaterial evidence to meet immaterial evidence is within the *discretion* of the presiding judge.⁸

1, *Ingram v. Wackernagel*, 83 Iowa 82; *Bogk v. Gassert*, 149 U. S. 17.

2, *Farmers' Bank v. Winfield*, 24 Wend. 421; *San Diego Land Co. v. Neale*, 88 Cal. 50; *Davis v. Keyes*, 112 Mass. 436.

3, *Manning v. Railway Co.*, 64 Iowa 240; *People v. Dowling*, 84 N. Y. 478; *Stringer v. Young's Lessee*, 3

Peters 336. Clearly so where the proffered testimony does not tend to disprove that so received, *Gorsuch v. Rutledge*, 70 Md. 272. The same rule holds where the testimony is incompetent, *McCurtney v. Territory*, 1 Neb. 121.

4, *Farmers' Bank v. Winfield*, 24 Wend. 421.

5, *Lutton v. Town of Vernon*, 62 Conn. 1, in which case the testimony was excluded at the request of the party offering it.

6, *Brand v. Longstreet*, 4 N. J. L. 325.

7, *Brown v. Perkins*, 1 Allen 89; *Scattergood v. Wood*, 79 N. Y. 263; *Sherley v. Evansville Ry. Co.*, 121 Ind. 427; *Ingram v. Wackernagel*, 83 Iowa 82; *Dodge v. Kiene*, 28 Neb. 216; *Havis v. Taylor*, 13 Ala. 324; *Stevenson v. Gunning's Estate*, 64 Vt. 601; *McElheny v. Pittsburg Ry. Co.*, 147 Pa. St. 1, where the objecting party introduced the subject on cross-examination.

8, *Treat v. Curtis*, 124 Mass. 348; *Fusbush v. Goodwin*, 25 N. H. 425.

§ 170. General rules as to relevancy.—

There is no more familiar principle in the law of evidence than this,—that if the testimony proposed is relevant and is not forbidden by some one of the exclusionary rules of evidence, it should be received.¹ It is not a sufficient objection that the evidence proposed is of little weight, since that is a matter addressed solely to the jury;² nor is the proposed testimony to be necessarily rejected because it may not bear directly upon the issue. If it forms a link in the chain of testimony³ or *tends* in any degree to *establish the fact* in controversy, it should be received.⁴ But since the court is compelled to rule upon the admission of testimony when it is offered, the

offer of the evidence should contain information as to the manner in which the evidence is to become relevant.⁵ Although the evidence may be irrelevant for one purpose, it may be relevant as to other facts in issue; and, if so, it should be received; but in such case it is proper that the court should explain to the jury the purpose for which it is admitted and restrict its application.⁶ But if the testimony is legally insufficient for the purpose for which it is offered it may be properly rejected.⁷ So testimony which is competent as to one party should not be excluded because not competent against another party to the suit. In such case the effect of the evidence may be limited by proper instructions.⁸ Evidence which may not seem to bear directly upon the contested matters of fact may illustrate the conduct of a party by throwing light on his motives; and if this is a material inquiry such evidence should not be rejected.⁹ It is not always necessary that evidence should *appear at the time to be relevant*. It is sometimes impossible to anticipate exactly what questions may arise in the course of the trial; and testimony should be received if it would be relevant and competent in view of the questions which may be reasonably expected to arise upon the issue joined.¹⁰ If testimony is introduced with the understanding that it will be shown to be relevant by connecting acts and no such facts are proved, it should

on request be withdrawn from the consideration of the jury by the instruction of the court.¹¹ To state the rule more broadly,—where illegal testimony has been admitted by the court against objection, nothing short of a direct and unequivocal charge to the jury, that they must disregard the illegal proof, can cure the error of its admission.¹² It is the general rule that it should be left to the *discretion* of the presiding judge to determine whether he will require proof of connecting or preliminary facts before deciding the question of relevancy or whether he will admit the testimony on the statement of counsel that he expects to show the relevancy by other facts.¹³ It often happens that certain preliminary questions of fact must be determined before it can appear whether the proffered testimony is relevant or competent. In such cases the duty devolves upon the *trial judge to decide such preliminary matters* of fact without the assistance of the jury.¹⁴ It sometimes happens, however, that the fact upon which the admissibility of evidence depends is a material and *issuable fact* in the case; for example, the admissibility of a deed may depend upon whether it has been executed, that being a material, disputed fact. In such cases the judge does not decide the preliminary issue peremptorily, but submits the testimony tending to prove such fact to the jury, leaving it to them to pass upon its weight.¹⁵

When the preliminary question of fact is for the judge his decision must be final, if there is any proper evidence to support it. As in all questions of that nature, exceptions to the ruling at the trial will be sustained only when they show clearly that there was some erroneous application of the principles of law to the facts of the case or that the evidence was admitted without proper proof of the qualifications requisite for its competency.¹⁶ The admission of testimony which at the time is irrelevant is cured by the subsequent admission of proper testimony which shows the former to be admissible.¹⁷ It is a familiar rule which may be implied from all the authorities cited in this section that if the evidence proposed is clearly irrelevant it should be rejected. And the judge may reject such evidence on his own motion, whether objected to or not.¹⁸

1, This is illustrated by most of the cases cited in this section. Such testimony should be received even though obtained by improper means, *Cluett v. Rosenthal*, 100 Mich. 193.

2, *Holmes v. Goldsmith*, 147 U. S. 150; *Sanders v. Stokes*, 30 Ala. 432; *Belden v. Lamb*, 17 Conn. 441; *Sample v. Lipscomb*, 18 Ga. 687; *Slack v. McLagan*, 15 Ill. 242; *Farwell v. Tyler*, 5 Iowa 535; *Trull v. True*, 33 Me. 367; *Richardson v. Milburn*, 17 Md. 67; *Jones v. Letcher*, 13 B. Mon. (Ky.) 363; *Tucker v. Peaslee*, 36 N. H. 167; *Fitzwater v. Stout*, 16 Pa. St. 22. In *Isbue v. New York Ry. Co.*, 25 Conn. 556, the qualities of an object in dispute were allowed to be shown by comparison thereof with the known qualities of an object not in dispute.

3, *Hunter v. Harris*, 131 Ill. 482; *Tams v. Bullitt*, 35 Pa. St. 308; *Schuchardt v. Allens*, 1 Wall. 359; *Remy v. Olds*, (Cal.) 34 Pac. Rep. 216.

4, *Jones v. Letcher*, 13 B. Mon (Ky.) 363; *Johnson v. State*, 14 Ga. 55; *Colglazier v. Colglazier*, 124 Ind. 196; *People v. Hare*, 57 Mich. 505; *Cleveland, C. C. & I. Ry. Co. v. Closser*, 126 Ind. 348; *Copp v. Hardy*, 32 Mo. App. 588; *Huntington v. Attrill*, 118 N. Y. 365; *Com. v. Robinson*, 146 Mass. 571.

5, *Weidlers v. Farmers Bank*, 11 Serg. & R. (Pa.) 134; *McCurry v. Hooper*, 12 Ala. 823; *Austin v. Robertson*, 25 Minn. 431.

6, *Webster v. Enfield*, 10 Ill. 298; *Brewin v. Farrell*, 39 Vt. 206; *McClelland v. Lindsay*, 1 Watts & S. (Pa.) 360; *Marshall v. Haney*, 4 Md. 498.

7, *McTavish v. Carroll*, 13 Md. 429; *State v. Neville*, 6 Jones (N. C.) 423; *O'Brien v. Hilburn*, 22 Tex. 616.

8, *Owens v. State*, 94 Ala. 97.

9, *Parsons v. Hooper*, 16 Gratt. (Va.) 64.

10, *Bedell v. Janney*, 9 Ill. 193; *Harris v. Holmes*, 30 Vt. 352; *Mosely v. Gordon*, 16 Ga. 384; *State v. McAllister*, 24 Me. 139.

11, *Rogers v. Brent*, 10 Ill. 573; *Doe ex dem. Davenport v. Harris*, 27 Ga. 68.

12, *Carlisle v. Hunley*, 15 Ala. 623; *Florey v. Florey*, 24 Ala. 241; *Delaware Canal Co. v. Barnes*, 31 Pa. St. 193.

13, *Downing v. DeKlyn*, 1 E. D. Smith (N. Y.) 563; *State v. Cherry*, 63 N. C. 493.

14, *Com. v. Coe*, 115 Mass. 481; as to admissibility of confessions, *State v. Carson*, 36 S. C. 524; as to the privilege or competency of a witness, *Childs v. Merrill*, 66 Vt. 302; see also sec. 796 *infra*; as to admissibility of documents, *Com. v. Coe*, 115 Mass. 481; see also sec. 171 *infra*.

15, *Swearinger v. Leach*, 7 B. Mon. (Ky.) 287; *Funk v. Kincaid*, 5 Md. 405; 1 Thomp. Trials sec. 676.

16, *Com. v. Coe*, 115 Mass. 481.

17, *Scott v. State*, 30 Ala. 503; *Bell v. Chambers*, 38 Ala. 660; *Tilton v. Tilton*, 41 N. H. 479.

18, *Cooper v. Barber*, 24 Wend. 105.

§ 171. Province of judge and jury.—

It is a familiar rule that the judge is to determine all questions of law that arise in the trial of a case and that the jury are to find the facts from the evidence introduced. But as a matter of fact judges frequently decide questions of fact and jurors apply the law as given by the court to the questions of fact involved. The *jury* decide upon the *weight* of the evidence and upon the *credibility* of the witnesses. The *judge* passes upon the *competency* of the witnesses and upon the *admissibility* of the evidence offered. The sphere of the jury as compared with that of the judge is a limited one.¹ The judge in a large degree controls and guides the actions of the jury from the beginning to the end of the trial. The work of the jury is confined to the determination of the ultimate facts which are the subject of the issue. The preliminary issues of fact that arise during the trial are with few exceptions determined by the judge. In theory the judge only determines those questions of fact which are preliminary in their nature and incidental to a decision upon the questions of law which are presented to him in passing on the admission of evidence and upon like questions. But in

fact in various ways in the exercise of their right to guide the course of the trial, judges have come to exercise important functions in co-operation with the jury in determining even the ultimate facts in issue. In applying the various presumptions which constantly limit the judgment of juries, in defining the meaning of the terms which juries are called upon to consider, in excluding from their consideration testimony which may be deemed too remote and in many other ways judges impose restraints upon juries which very materially limit their power.² It is also in the province of the judge to determine whether there is *sufficient evidence* in the case to warrant its submission to the jury. If there is such evidence as would cause reasonable men to draw different conclusions, the case should be submitted to the jury. But a mere *scintilla of evidence* or mere surmise will not sustain a refusal on the part of the judge to take the case from the jury and to grant a nonsuit. The recent decisions have extended the province of the judge in such cases and have completely exploded the old doctrine by which a judge was compelled to submit the case to the jury if there was a scintilla of evidence to support the claim of the plaintiff. In place of the old rule has come the more reasonable one that in every case there is a preliminary question for the judge whether there is evidence upon which the jury may properly

proceed to find a verdict.³ When the evidence with all the inferences that the jury can justifiably draw from it is insufficient to support a verdict for the plaintiff, it is the duty of the court to take the case from the jury and to *direct a verdict* or grant a *nonsuit* as the facts of the case may warrant.⁴ It is proper for the court to so instruct the jury when the evidence has been too loose and inconclusive to establish the facts sought to be proved without indulging in mere conjecture or speculation.⁵ But the judge should not in so doing encroach upon the province of the jury by dictating or influencing their verdict when there is any sufficient evidence which tends to show that there are two sides to the controversy. In a recent case in the federal supreme court Justice Swayne said: "Though the duties of the court and jury are correlative, they are distinct; and it is important to the right administration of justice that they should be kept so. It is as much within the province of the jury to decide questions of fact as of the court to decide questions of law. The jury should take the law as laid down by the court and give it full effect. But its application to the facts—and the facts themselves—it is for them to determine. These are the checks and balances which give to the trial by jury its value. Experience has proved their importance. They are indispensable to the harmony and proper effi-

cacy of the system." ⁶ The judge, however, may exercise a reasonable discretion in *reviewing the evidence* to aid the jury in arriving at a just conclusion. It does not necessarily follow that it is error for the judge to so charge the jury that they are able to infer the view entertained by him as to the facts in issue. If the language of the court is merely advisory and not intended to fetter the exercise of the judgment of the jury he may *recapitulate* the evidence calling their attention to undisputed facts, refreshing their memory as to important matters and thus directing their attention to the real points in issue.⁷ The control of the judge over the part in the trial taken by the jury does not end when the verdict is rendered; for it is the duty of the court to *set the verdict aside* if unwarranted by the evidence and to grant a new trial.⁸

1, *Thrasher v. Overly*, 51 Ga. 91; *Com. v. Coe*, 115 Mass. 481; *Jones v. Thatcher*, 41 N. H. 546; *Doe v. Davis*, 10 Q. B. 314. On the functions of the judge and the jury in the trial of a case see 2 Law Rev. 27-44; 1 Law Rev. 37. See also a valuable article in 4 Harv. L. Rev. 147 by Prof. Thayer, and also sec. 6, *Thay. Cas. Ev.* See extended notes on this general subject, 72 Am. Dec. 538-549; 14 Am. St. Rep. 36-48; 86 Am. Dec. 327-331.

2, *Bartlett v. Smith*, 11 M. & W. 483; *Gorton v. Hadsell*, 9 Cush. 508, 511.

3, *Dwight v. Germania Ins. Co.*, 103 N. Y. 341, 359; *Baulec v. New York & H. Ry. Co.*, 59 N. Y. 356, 366; *Hyatt v. Johnson*, 91 Pa. St. 200; *Improvement Co. v. Munson*, 14 Wall. 442; *Commissioners v. Clark*, 94 U. S. 278, 284; *Griggs v. Houston*, 104 U. S. 553; *Bailey v.*

Cleveland Rolling Mills, 21 Fed. Rep. 159; *Witherbee v. Wasson*, 71 N. C. 451; *Toomey v. Ry. Co.*, 3 C. B. N. S. 146; 91 E. C. L. 146; *Sioux City Ry. Co. v. Stout*, 17 Wall. 657, 663; *Langhoff v. Milwaukee Ry. Co.*, 19 Wis. 489; *Fitts v. Cream City Ry. Co.*, 59 Wis. 323; *Mynning v. Railway Co.*, 64 Mich. 93; 8 Am. St. Rep. 804; *Sidney Co. v. School District*, 122 Pa. St. 494; 9 Am. St. Rep. 124; *Carter v. Oliver Co.*, 34 S. C. 211; 27 Am. St. Rep. 815; *Linkauf v. Lombard*, 137 N. Y. 417; 33 Am. St. Rep. 743; *Woolwine's Adm. v. Railway Co.*, 36 W. Va. 329; 32 Am. St. Rep. 859.

4, *Hunt v. Chosen Friends*, 64 Mich. 671; 8 Am. St. Rep. 855; *Beard v. Railway Co.*, 79 Iowa 518; 18 Am. St. Rep. 381; *Anthony v. Wheeler*, 130 Ill. 128; 17 Am. St. Rep. 281; *Deyo v. Railway Co.*, 34 N. Y. 9; 88 Am. Dec. 418; *Achtenhagen v. Watertown*, 18 Wis. 331; *Metropolitan Ry. Co. v. Moore*, 121 U. S. 558; *Ellis v. Ohio Life Ins. Co.*, 4 Ohio St. 628, where it was contended by counsel that a nonsuit infringed on the constitutional right of trial by jury.

5, *Spring Gardens Insurance Co. v. Evans*, 9 Md. 1; 66 Am. Dec. 308; *Sprigg v. Moale*, 28 Md. 497; 92 Am. Dec. 698; *Alexander v. Harrison*, 38 Mo. 258; 90 Am. Dec. 431; *Satterwhite v. Hicks*, Busb. (N. C.) 105; 57 Am. Dec. 577; *Riggin v. Insurance Co.*, 7 Harr. & J. (Md.) 279; 16 Am. Dec. 302. See notes, 72 Am. Dec. 538-549; 14 Am. St. Rep. 36-48.

6, *Hickman v. Jones*, 9 Wall. 197, 201-2; *Houghtaling v. Ball*, 19 Mo. 84; 59 Am. Dec. 331; *White v. Hass*, 32 Ala. 430; 70 Am. Dec. 548; *Wilson v. Huston*, 13 Mo. 146; 53 Am. Dec. 138; *Trovillo v. Tilford*, 6 Watts (Pa.) 468; 31 Am. Dec. 484; *Claffin v. Rosenberg*, 42 Mo. 439; 97 Am. Dec. 336; *Garner v. State*, 28 Fla. 113; 29 Am. St. Rep. 232.

7, *Nudd v. Burrows*, 91 U. S. 426, 439; *Wright v. Mulvaney*, 78 Wis. 89; *Cobb v. Covenant Assn.*, 153 Mass. 176; *Hurlburt v. Hurlburt*, 128 N. Y. 420; *McClain v. Com.*, 110 Pa. St. 263.

8, This is elementary and cases need not be cited.

§172. Same—Mixed questions of law and fact—Construction of writings—Statutes, etc.—The blending of questions of law and fact often makes it difficult to apply the rule that questions of fact are to be determined by the jury and questions of law by the judge. Many actions, such as those for malicious prosecution, for fraud and for negligence,¹ arise from causes involving both questions of law and of fact.² In such cases it is the general rule that the question is to be left to the jury to decide after they have been properly instructed by the judge as to the law applicable to the case.³ The most perplexing of these mixed questions of law and fact are those arising in the decision of cases involving questions of what is *reasonable care* or *reasonable time*. The authorities in order to promote uniformity and certainty in the law are inclined to leave the determination of such questions to the court, if the particular case can be decided according to settled legal principles without passing judgment on the facts. But many of the cases involve such complicated questions of fact as to make it impossible to separate them from the questions of law and in those cases the whole matter has to be left to the jury for decision.⁴ It is firmly established and universally recognized that the judge is to construe and *interpret the contracts* and other *written instruments* of every description that

are offered in evidence. Their construction and interpretation are governed by established rules of law of which knowledge on the part of the jury cannot be presumed. And hence the question must be left to the court.⁵ "Of a great part of the writings brought under judicial consideration, it is true that they were made, as Bracton says, to eke out the shortness of human life, *ad perpetuam memoriam, propter brevem hominum vitam*. Such things, so important, so long enduring, should have a fixed meaning; should not be subject to varying interpretations; should be interpreted by whatever tribunal is most permanent, best instructed, most likely to adhere to precedents."⁶ The legal effect and scope of contracts,⁷ deeds,⁸ mortgages⁹ and other muniments of title,¹⁰ as well as of wills,¹¹ notes¹² and other written instruments¹³ often involve intricate questions of law which can only be properly passed upon by one well versed in the principles of the law, so that their construction is always a question for the court rather than for the jury. So the construction of *statutes*, city ordinances and by-laws¹⁴ and of such written and unwritten law of foreign countries as have been proved,¹⁵ as well as of treaties¹⁶ is for the court. Although the distinction is made that the question of the *existence* of a foreign law is a matter of fact for the jury, the analogy and reason of the law would seem to lead to the

conclusion that it is equally the province of the judge to decide upon the existence of foreign as well as of domestic law.¹⁷ But when a written instrument cannot be construed without the aid of parol evidence or the reference to facts outside the writing itself¹⁸ or when its construction *involves questions of fact*, the instrument should be submitted to the jury rather than to the judge to find the facts. But the legal effect of the contract is still a question of law for the judge.¹⁹ The rule is the same when the instrument contains technical terms or words peculiar to some particular occupation or business²⁰ or when it is obscure or ambiguous because poorly written or partly erased.²¹

1, Fraud, *Dowd v. McCraw*, 8 Ark. 83; 46 Am. Dec. 301; negligence, *Wabash Ry. Co. v. Locke*, 112 Ind. 404; 2 Am. St. Rep. 193; malicious prosecution, *Gulf Ry. Co. v. James*, 73 Tex. 12; 15 Am. St. Rep. 743.

2, The province of the judge and jury relative to questions of mixed law and fact is stated in the following cases: *Minor v. Edwards*, 12 Mo. 137; 49 Am. Dec. 121; *Martin v. Broach*, 6 Ga. 21; 50 Am. Dec. 306; *Rotn v. Railway Co.*, 34 N. Y. 548; 90 Am. Dec. 736.

3, *Hutchinson v. Bowker*, 5 M. & W. 535; *McDonald v. Rooke*, 2 Bing. N. C. 217; *James v. Phelps*, 11 Adol. & Ell. 483; *Townsend v. State*, 2 Blackf. (Ind.) 151; *Beaman v. Russell*, 20 Vt. 205; 49 Am. Dec. 775; *Gulf Ry. Co. v. James*, 73 Tex. 12; 15 Am. St. Rep. 743. The distinction between questions of law and of fact as drawn by the courts is illustrated by the following cases: Questions of law for the court — the term when a judgment was entered, *Adams v. Betz*, 1 Watts (Pa.) 425; 26 Am. Dec. 79; what are the general customs of a country, *Bodfish v. Fox*, 23 Me. 90;

39 Am. Dec. 611; what is a waiver, *Spring Gardens Ins. Co. v. Evans*, 9 Md. 1; 66 Am. Dec. 308; what acts constitute an abandonment of a contract, *Dula v. Cowles*, 7 Jones (N. C.) 290; 75 Am. Dec. 463. Questions of fact for the jury — what are appurtenances, *Hall v. Benner*, 1 Pen. & W. (Pa.) 402; 21 Am. Dec. 394; whether a party had notice of an assignment, *Marr v. Hanna*, 7 J. J. Marsh. (Ky.) 642; 23 Am. Dec. 449; existence of boundary, *Newman v. Foster*, 3 How. (Miss.) 383; 34 Am. Dec. 98; existence of custom or usage that is not general, that is confined to one locality, *Farnsworth v. Chase*, 19 N. H. 534; 51 Am. Dec. 206; *Bodfish v. Fox*, 23 Me. 90; 39 Am. Dec. 611; delivery, *Atwell v. Miller*, 6 Md. 10; 61 Am. Dec. 294; rescission of contract, *Blood v. Enos*, 12 Vt. 625; 36 Am. Dec. 363; whether a contract was made for illegal purposes, *Fellows v. Russell*, 20 N. H. 427; 51 Am. Dec. 238; whether a deed has been delivered, *Hannah v. Swarner*, 8 Watts (Pa.) 9; 34 Am. Dec. 442.

4, *Aymar v. Beers*, 7 Cow. 705; 17 Am. Dec. 538; *Gilmore v. Wilbur*, 12 Pick. 120; 22 Am. Dec. 410; *Morse v. Bellow*, 7 N. H. 549; 28 Am. Dec. 372; *Dwinel v. Veazie*, 44 Me. 167; 69 Am. Dec. 94; *Luckhart v. Ogden*, 30 Cal. 547; *Howe v. Huntington*, 15 Me. 350; *Tindal v. Brown*, 1 T. R. 167; *Spoor v. Spooner*, 12 Met. 281, 284; *Gammon v. Abrams*, 53 Wis. 323; *Lamb v. Camden Ry. Co.*, 2 Daly (N. Y.) 454, 473; *Cochran v. Toher*, 14 Minn. 385, 389; *Magee v. Carmack*, 13 Ill. 289, 291; *Nudd v. Wells*, 11 Wis. 407. See also cases cited in 19 Eng. & Am. Ency. Law 640-5; and extended note in 17 Am. Dec. 544-549, showing the application of the rule to a large variety of cases.

5, *Sidwell v. Evans*, 1 Pen. & W. (Pa.) 383; 21 Am. Dec. 387; *Drew v. Towle*, 30 N. H. 531; 64 Am. Dec. 309; *Hamilton v. Liverpool Ins. Co.*, 136 U. S. 255; *Randall v. Thornton*, 43 Me. 226; 69 Am. Dec. 56; *Levy v. Gadsby*, 3 Cranch 180; *Smith v. Clayton*, 29 N. J. L. 357; *Illinois Central Ry. Co. v. Cassell*, 17 Ill. 389; *Snyder v. Kurtz*, 61 Iowa 593; *McKinzie v. Sykes*, 47 Mich. 294; *Welsh v. Duser*, 3 Binn. (Pa.) 329; *Neilson v. Hartford*, 8 M. & W. 832; *Goddard v. Foster*, 17 Wall. 123; *Luckhart v. Ogden*, 30 Cal. 547; *Auffmordt v. Stevens*, 46 Conn. 411; *Russell v. Arthur*, 17 S. C. 477; *United States v. Shaw*, 1 Cliff. (U. S.)

317; *Begg v. Forbes*, 30 Eng. L. & Eq. 508; *Reissner v. Oxley*, 80 Ind. 580; *Warner v. Miltenberger*, 21 Md. 264; 83 Am. Dec. 573; *Bedard v. Bonville*, 57 Wis. 270. See extended note, 69 Am. Dec. 454 on this general topic.

6, *Thayer Cas. Ev.* p. 148.

7, See cases above cited. This rule holds even when the contents of a lost contract are proved by parol, *Berwick v. Horsfall*, 4 C. B. N. S. 450.

8, *Carson v. Ray*, 7 Jones (N. C.) 609; 78 Am. Dec. 267; *Peterson v. Laik*, 24 Mo. 541; 69 Am. Dec. 441; *Stevens v. Hollister*, 18 Vt. 294; 46 Am. Dec. 154; *Hurley v. Morgan*, 1 Dev. & B. (N. C.) 425; 28 Am. Dec. 579; *McCutchen v. McCutchen*, 9 Port. (Ala.) 650; *Seaward v. Malotte*, 15 Cal. 304; *Montag v. Linn*, 23 Ill. 551; *Muller v. Shackelford*, 4 Dana (Ky.) 264; *Bonney v. Morrill*, 52 Me. 252; *Whittelsey v. Kellogg*, 28 Mo. 404; *Dean v. Erskine*, 18 N. H. 81; *Cox v. Freedley*, 33 Pa. St. 124; *Morse v. Weymouth*, 28 Vt. 825; *Hughes v. Westmoreland Co.*, 104 Pa. St. 207.

9, *St. John v. Bumpstead*, 17 Barb. 100.

10, *Thornberry v. Churchill*, 4 T. B. Mon. (Ky.) 29; 16 Am. Dec. 125; *Hanson v. Eastman*, 21 Minn. 509.

11, *Warner v. Miltenberger*, 21 Md. 264; 83 Am. Dec. 573; *Willson v. Whitfield*, 38 Ga. 269; *Sartor v. Sartor*, 39 Miss. 760; *Burke v. Lee*, 76 Va. 386. The court determines whether a will has been executed with proper formalities, *Riley v. Riley*, 36 Ala. 496; *Roe v. Taylor*, 45 Ill. 485.

12, *Terry v. Shively*, 64 Ind. 106; *Belfast Bank v. Hariman*, 68 Me. 522.

13, *Records*, *Hempstead v. Des Moines*, 52 Iowa 303; *Adams v. Betz*, 1 Watts (Pa.) 425; 26 Am. Dec. 79; acknowledgment of debt, *Warlick v. Peterson*, 58 Mo. 408; *Morrell v. Frith*, 3 M. & W. 402; receipts, *Union Bank v. Heyman*, 15 S. C. 296; decrees, *Shook v. Blount*, 67 Ala. 301.

14, *Barnes v. Mayor*, 19 Ala. 707; *Fairbanks v. Woodhouse*, 6 Cal. 433; *Denver Ry. Co. v. Olsen*, 4 Col. 239; *Peoria v. Calhoun*, 29 Ill. 317; *Maltus v. Shields*, 2 Met. (Ky.) 553; *Bonine v. Richmond*, 75 Mo. 437.

15, *Sidewell v. Evans*, 1 Pen. & W. (Pa.) 383; 21 Am. Dec. 387; *Cecil v. Barry*, 20 Md. 287; 83 Am. Dec. 553; *Consequa v. Willings*, 1 Peters C. C. 225; *Kline v. Baker*, 99 Mass. 253; *Charlotte v. Chouteau*, 33 Mo. 194; *State v. Jackson*, 2 Dev. (N. C.) 563; *Ennis v. Smith*, 14 How. 400; *Ufford v. Spaulding*, 156 Mass. 65; *Insurance Co. v. Wright*, 60 Vt. 522; *Alexander v. Pennsylvania Co.*, 48 Ohio St. 623; *Hawes v. State*, 88 Ala. 37.

16, *Harris v. Doe*, 4 Blackf. (Ind.) 369.

17, See note, *Thayer Cas. Ev.* p. 154.

18, *Watson v. Blaine*, 12 Serg. & R. (Pa.) 131; 14 Am. Dec. 669; *Edelman v. Yeakel*, 27 Pa. St. 26; *School District v. Lynch*, 33 Conn. 330; *Symmes v. Brown*, 13 Ind. 318; *Ganson v. Madigan*, 15 Wis. 144; 82 Am. Dec. 659; *Redard v. Bonville*, 57 Wis. 270; *Etting v. Bank* 11 Wheat. 59; *Gibbs v. Gilead Society*, 38 Conn. 153; *First National Bank v. Dana*, 79 N. Y. 108; *Wheeler v. Schroeder*, 4 R. I. 383; *Taylor v. McNutt*, 58 Tex. 71; *Bradford v. Railway Co.*, 7 Rich. L. (S. C.) 201; 62 Am. Dec. 411.

19, *Sidewell v. Evans*, 1 Pen. & W. (Pa.) 383; 21 Am. Dec. 387; *Fagen v. Connolly*, 25 Mo. 94; 69 Am. Dec. 450 and extended note; *Miller v. Ford*, 4 Rich. L. (S. C.) 376; 55 Am. Dec. 687; *Atwell v. Miller*, 6 Id. 10; 61 Am. Dec. 294. This proposition is also sustained by the great majority of the cases cited in notes 5 to 13 *supra* to this section.

20, *Lucas v. Groning*, 7 Taunt. 164; *Rees v. Warwick*, 2 Barn. & Ald. 113; *Smith v. Thompson*, 8 C. B. 44; *Brown v. McGran*, 14 Peters 479; *Simpson v. Margitson*, 11 Adol. & Ell. N. S. 23; 63 E. C. L. 23; *Bowes v. Shand*, L. R. 2 App. Cas. 530; *Alexander v. Vanderzee*, L. R. 7 C. P. 530; *Goddard v. Foster*, 17 Wall. 123; *McAvoy v. Long*, 13 Ill. 147; *Williams v. Woods*, 16 Md. 220; *Prather v. Ross*, 17 Ind. 495; *Eaton v. Smith*, 20 Pick. 150; *Silverthorne v. Fowle*, 4 Jones (N. C.) 362.

21, *Holland v. Long*, 57 Ga. 36; *Paine v. Ringold*, 43 Mich. 341. But where the ambiguity is in the words themselves, the court will determine their meaning if possible itself, *Morrell v. Frith*, 3 M. & W. 402.

§173. The court decides questions of law — Criminal cases.— While occasionally a case holds that the jury have the right to determine the law of the case,¹ yet the great weight of authority establishes the rule that *questions of law are to be decided by the court*. The real exceptions to this rule are mostly cases decided under constitutional or statutory provisions that make the jury judges of the law and of the fact in certain criminal actions. Some cases also hold that the jury are to determine the law in criminal cases, but this is contrary to the great weight of authority. Many of the cases that seem to sustain this rule really depend upon the fact that in case of acquittal in a criminal prosecution no new trial can be granted whether the jury have taken the interpretation given to the law by the judge or not. This is, however, not because the jury have the right to finally decide the law, but because no man can be tried for an offence of which he has once been acquitted.²

1, Many of these cases are in such actions as those for libel, see the case of *King v. Dean of St. Asaph*, 3 T. R. 428.

2, Maryland, Louisiana, Illinois, Indiana and Georgia have such a provision in their constitutions. For an excellent and exhaustive review of the authorities, see *State v. Burpee*, 65 N. H. 1; 36 Am. St. Rep. 775. See also *Com. v. Porter*, 10 Met. 263, a leading case. For an elaborate collection of authorities in support of the view that the jury have the right to determine the law in criminal cases, see note to *Erving v. Cradock*, *Quincey* (Mass.) 558—572.

CHAPTER 6.

BURDEN OF PROOF.

- § 174. Burden of proof—On whom does it lie?
- § 175. Same—Shifting of the burden.
- § 176. Same—Form of pleadings.
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Exceptions.
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- § 179. Burden as to particular facts lying peculiarly within knowledge of a party.
- § 180. Actions against common carriers—Telegraph companies.
- § 181. Same, continued.
- § 182. Same—Negligence—Setting fires, etc.
- § 183. Contributory negligence.
- § 184. Burden in cases of bailment—Warehousemen.
- § 185. Innkeepers.
- § 186. Insanity—Civil cases—Criminal.
- § 187. Burden in probate of wills—Testamentary capacity.
- § 188. Burden of proof as between persons in a fiduciary relation.
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- § 190. Burden as to crimes—Fraud.
- § 191. Burden in quo warranto proceedings.
- § 192. Burden as to statutes of limitation.
- § 193. Burden and weight of proof where crime is in issue in civil cases.
- § 194. Statutes as to burden of proof.
- § 195. The right to begin and reply.
- § 196. Same, continued.

§174. Burden of proof—On whom does it lie?—Mr. Stephen thus states the rule which prevails in England for determining on whom the general burden of proof lies: "The burden of proof in any proceeding lies at first on that party against whom the judgment of the court would be given, if no evidence at all were produced on either side, regard being had to any presumption which may appear upon the pleadings. As the proceedings go on the burden of proof may be shifted from the party on whom it rested at first by his proving facts which raise a presumption in his favor."¹ This rule has been quite generally approved in this country.² Whenever litigation exists somebody must go on with it; the plaintiff is the first to begin; if he does nothing, he fails. If he makes a *prima facie* case and nothing is done to answer it, the defendant fails. The test, therefore, as to the burden or *onus* of proof is simply to consider *which party would be successful if no evidence were given*, or if no more evidence were given than has been given at a particular point of the case; for it is obvious that during the controversy in the litigation there are points at which the *onus* of proof shifts and at which the tribunal must say, if the case stopped there, that it must be decided in a particular manner. Such being the test, the burden can not rest forever upon the one on whom it is first cast; but

as soon as he in his turn brings evidence which *prima facie* rebuts the evidence against which he is contending, the burden shifts again until there is evidence which once more turns the scale.³ That being so, the question as to *onus* of proof is only a rule for deciding on whom the obligation rests of going further, if he wishes to win. The words "burden of proof" are so often used by different parties to convey such widely different ideas that no very satisfactory statement of their meaning can be made. A learned author in a very able discussion has well pointed out the confusion of ideas upon the subject and shown that the term "burden of proof" is used in two ways: (1) to indicate the duty of bringing forward argument or evidence in support of a proposition at the beginning or later; (2) to mark that of establishing a proposition as against all counter argument or evidence.⁴ It is often used indiscriminately in either sense and even in both senses.

1, Steph. Ev. art. 95.

2, 1 Whart. Ev. sec. 357; Foster v. Reid, 78 Iowa 205; 16 Am. St. Rep. 437 and note. This is illustrated by many cases cited in this chapter. See notes, 37 Am. Rep. 148; 28 Am. Rep. 308 for a discussion of burden of proof in general. See also 25 Alb. L. Jour. 124, cases where a negative is to be proved; 2 Univ. L. Rev. 59, degrees and burden of proof.

3, Albrath v. Northeastern Ry. Co., L. R. 11 Q. B. Div. 79; 11 App. Cas. 247.

4, Prof. Thayer in 4 Harv. Law Rev. 45. Refusal to charge as to the burden of proof, if not covered by the main charge, has been held reversible error in civil cases, *Schilling v. Town of Verona*, 88 Wis. 317, 321; *Cleveland, C. C. & St. L. Ry. Co. v. Richey*, 43 Ill. App. 247; *Watt v. Kirby*, 15 Ill. 200; *Gordon v. Richmond*, 83 Va. 436; *Texas Ry. Co. v. Ayres*, 83 Tex. 268. The rule is the same in criminal cases, *Reeves v. State*, 29 Fla. 527; *Hurd v. State*, 94 Ala. 100; *State v. Graham*, 96 Mo. 120; *Pierce v. State*, (Tex.) 22 S. W. Rep. 587.

§ 175. Same — Shifting of the burden.—In Massachusetts there is a line of judicial decisions in which the attempt has been made to clearly distinguish between the terms "burden of proof" and "weight of evidence;" it is there insisted that, while the latter shifts from side to side in the progress of a trial according to the nature and strength of the proof offered, the burden of proof does not shift or change in any aspect of the case.¹ While the Massachusetts cases are sometimes quoted with approval on this point in other states, this attempt to thus restrict the meaning of the term "burden of proof" does not seem to have met with general approval;² and the labored distinctions which in numerous cases have been made between the "weight of evidence" and the "burden of proof" have been of but little practical value. In those cases where the *answer* is a mere *general denial* and the defendant only assumes to rebut the plaintiff's proof, it may be properly said that the burden of proof is

upon the plaintiff throughout and that it never shifts.³ Nor is the burden of proof shifted by the mere fact that evidence is offered against the defendant of his *admission* of the breach of duty charged against him. In an action for negligence where it was claimed that the default was admitted, the court said: "Upon this question the plaintiffs held the affirmative throughout the trial; and their relation to the question never changed. During the progress of a trial it often happens that a party gives evidence tending to establish his allegation, sufficient it may be to establish it *prima facie*, and it is sometimes said that the burden of proof is then shifted. All that is meant by this is that there is a necessity of evidence to answer the *prima facie* case or it will prevail, but the burden of maintaining the affirmative of the issue involved in the action is upon the party alleging the fact which constitutes the issue; and this burden remains throughout the trial."⁴ It is held that the burden of proof does not shift after the formal proof of a will is made where the issue is the *sanity of the testator*, but throughout the case the issue is the same and the burden of proof is upon the proponent.⁵ And in *criminal cases* it is the prevailing rule that the burden of proving the defendant's guilt upon the whole testimony remains on the prosecution throughout the case.⁶ The application of this general rule in cases where *insanity* is urged as a *defense* is discussed else-

where.⁷ Where a defendant introduces proof that he was not present when the alleged offense was committed, the burden of proof is not changed; it is the duty of the jury to consider all the evidence in the case including that relating to the *alibi* and to determine from the whole evidence whether it is shown beyond a reasonable doubt that the defendant committed the crime charged.⁸

1, *Central Bridge Co. v. Butler*, 2 Gray 132; *Gay v. Bates*, 99 Mass. 263; *Nichols v. Munsel*, 115 Mass. 567; 4 Harv. L. Rev. 45; *Heinemann v. Heard*, 62 N. Y. 448; *Clark v. Hills*, 67 Tex. 141.

2, See discussion by Prof. Thayer, 4 Harv. L. Rev. 45 and cases cited.

3, *Rothrock v. Perkinson*, 61 Ind. 39; *Jarboe v. Schreb*, 34 Ind. 350; *Lafayette Ry. Co. v. Ehman*, 30 Ind. 83; *Beringer v. Lake Superior Iron Co.*, 41 Mich. 305; *Ingals v. Eaton*, 25 Mich. 32; *Lafayette v. Wortman*, 107 Ind. 404; *Wilder v. Cowles*, 100 Mass. 487; *Tennessee Coal, Iron & Ry. Co. v. Hamilton*, 100 Ala. 252.

4, *Heinemann v. Heard*, 62 N. Y. 448.

5, *Crowninshield v. Crowninshield*, 2 Gray 524. The rule is the same when the action is on *quantum meruit* and the defendant gives proof of a special agreement for the purpose of rebutting the plaintiff's evidence, *Phipps v. Mahon*, 141 Mass. 471; and when the defendant gives evidence to rebut the presumption of consideration arising from the execution of a note, *Burnham v. Allen*, 1 Gray 496. See also notes, 33 Am. Dec. 555; 48 Am. Dec. 595. See sec. 187 *infra*.

6, See sec. 190 *infra*. But see, *Henwood v. State*, (Ind. App.) 39 N. E. Rep. 289; *Holder v. State*, (Tex. Crim. App.) 29 S. W. Rep. 793.

7, See sec. 186 *infra*.

8, *Albritten v. State*, 94 Ala. 76; *People v. Fong Ah Sing*, 64 Cal. 253; *Murphy v. State*, 31 Fla. 166; *Landis v. State*,

70 Ga. 652; 48 Am. Rep. 588; *Miller v. People*, 39 Ill. 457; *Howard v. State*, 50 Ind. 190; *Com. v. Choate*, 105 Mass. 451; *People v. Pearsall*, 50 Mich. 233; *Pollard v. State*, 53 Miss. 410; *State v. Sanders*, 106 Mo. 188; *State v. McCluer*, 5 Nev. 132; *People v. Stone*, 117 N. Y. 480; *State v. Josey*, 64 N. C. 56; *Walters v. State*, 39 Ohio St. 215; *Watson v. Com.*, 95 Pa. St. 418; *State v. Watson*, 7 S. C. 63; *Chappel v. State*, 7 Coldw. (Tenn.) 92; *Ayres v. State*, 21 Tex. App. 399; *Thompson v. Com.*, 88 Va. 45. See also, *State v. Ward*, 61 Vt. 153; *State v. Fry*, 67 Iowa 475; *State v. Reitz*, 83 N. C. 634.

§ 176. **Same—Form of pleadings.**—In actions for *tort* the burden is clearly upon the plaintiff to prove the charge, including the extent of the injury and the malice or other acts of aggravation, if exemplary damages are claimed; and throughout the trial the *onus* remains upon him to prove the acts complained of.¹ But if the defendant pleads a release, a discharge in bankruptcy² or other substantive defense,³ the burden is shifted upon him to prove such affirmative defense. On the other hand if the formal execution of such release is admitted by the plaintiff, and if he claims that the release was obtained by fraud, the burden is again shifted upon him to prove the fraud which he alleges.⁴ So where the plaintiff replies to the plea of former recovery that the same was a voluntary nonsuit, the burden of proving this allegation is shifted back to the plaintiff.⁵ In actions against a common carrier the burden is first upon the passenger or shipper to prove injury or loss, but the *onus* then

shifts to the other side to show that the loss or injury happened under such circumstances that no liability arose.⁶ So in actions upon contract the burden is in the first instance upon the plaintiff to prove its execution unless it is admitted, but the burden then shifts upon the defendant to prove any such defense as usury,⁷ payment,⁸ settlement,⁹ warranty,¹⁰ release,¹¹ setoff or counter claim,¹² rescission¹³ or such other affirmative defense as he may rely upon to defeat the contract.¹⁴

1, *Morrissey v. Chicago, B. & Q. Ry. Co.*, 38 Neb. 406.

2, *Robinson v. Hitchcock*, 8 Met. 64; *Blanchard v. Young*, 11 Cush. 341.

3, *Molaske v. Ohio Coal Co.*, 86 Wis. 220; *Thomas v. Funkhauser*, 91 Ga. 478, local custom; *Blunt v. Barrett*, 124 N. Y. 117, permission; *Alabama, G. S. Ry. Co. v. Frazier*, 93 Ala. 45, necessity; *Moffat v. Moffat*, (Iowa) 57 N. W. Rep. 954, payment to agent; *Shmit v. Day*, (Ore.) 39 Pac. Rep. 870, assignment of contract for work under which an injury occurred.

4, *Robinson v. Hitchcock*, 8 Met. 64; *Dalrymple v. Hillenbrand*, 62 N. Y. 5; 20 Am. Rep. 438; *Reeve v. Liverpool Ins. Co.*, 39 Wis. 520; *Feldman v. Gamble*, 26 N. J. Eq. 494.

5, *Bernard v. Babbitt*, 54 Ill. App. 62.

6, See sec. 181 *infra*.

7, *Cutter v. Wright*, 22 N. Y. 472; *Hough v. Hamlin*, 57 Iowa 359.

8, *Crowninshield v. Crowninshield*, 2 Gray 524; *Powers v. Russell*, 13 Pick. 69; *DeLand v. Dixon Nat. Bank*, 111 Ill. 323; *Harris v. Merz Iron Works*, 82 Ky. 200; *Smith's Appeal*, 52 Mich. 415; *North Pennsylvania Ry. Co. v. Adams*, 54 Pa. St. 94; *McCormick v. Sadler* (Utah) 40 Pac. Rep. 711.

- 9, *Baumier v. Antiau*, 79 Mich. 509.
- 10, *Johnston v. Johnston*, 26 Neb. 745.
- 11, *Blanchard v. Young*, 11 Cush. 341.
- 12, *McQuinn v. People's Nat. Bank*, 111 N. C. 509. But see a modification of the rule in *Doyle v. Unglish*, 143 N. Y. 556.
- 13, *Webber v. Dunn*, 71 Me. 331; *Gibson v. Vetter*, 162 Pa. St. 26; *Sparks v. Sparks*, 51 Kan. 195; *Coffin v. President Grand Rapids Hydraulic Co.*, 136 N. Y. 655.
- 14, *Ward v. Tucker*, 7 Wash. 399, false imprisonment; *Henderson v. City of Louisville (Ky.)* 4 S. W. Rep. 187, non-fulfillment of contract; *Church of Christ v. Beach*, 7 Wash. 65, mistake in written contract; *Ballard v. Carmichael*, 83 Tex. 355, trespass — plea of title in defendant; *Bliley v. Wheeler (Col. App.)* 38 Pac. Rep. 603, non-fulfillment of contract; *Temple St. Ry. Co. v. Hellman*, 103 Cal. 634, want of authority to execute a note.

§ 177. Same — Plaintiff generally has the burden — Exceptions.— Of course the pleadings are generally the guide in the first instance; and pleadings are so framed that in most cases the plaintiff is the actor who must take the initiative and the one on whom the burden of proof rests. Ordinarily, in the absence of any evidence on either side, the plaintiff's action would fail, but this is not necessarily true. For example, in an action on contract the defendant may admit the due execution of the contract but set up an independent defense, as want of consideration,¹ accord and satisfaction,² warranty,³ fraud,⁴ illegality,⁵ usury,⁶ release by discharge in insolvency or bankruptcy,⁷ payment,⁸ settle-

ment of the matters in controversy,⁹ alteration¹⁰ or rescission of contract;¹¹ in such cases he becomes the actor; and it is incumbent upon him to establish the affirmative defense which he alleges. This is well illustrated in actions on *insurance policies* where the answer admits the issuing of the policy and the loss and damages claimed, but alleges a breach of conditions; in such cases the plaintiff is entitled to a verdict unless the defendant satisfies the jury that the conditions have been broken. Nor is the rule changed in cases where the complaint alleges that none of the conditions of the policy have been broken and where the answer denies such allegation, since that is an allegation which it is not necessary for the plaintiff to make or prove.¹² In the instances above cited it appeared from the state of the pleadings that the burden of proof rested, not with the plaintiff, but with the defendant. When the form of the pleadings is such that at the beginning the burden is cast upon the plaintiff and he establishes his *prima facie* case, the burden of answering such case must then be met by the defendant or the plaintiff prevails.

1, *Delano v. Bartlett*, 6 Cush. 364; *Pratt v. Langdon*, 97 Mass. 97; 93 Am. Dec. 61; *Cook v. Noble*, 4 Ind. 221; *Topper v. Snow*, 20 Ill. 434; *Emery v. Estes*, 31 Me. 155; *Craig v. Proctor*, 6 R. I. 547.

2, *American v. Rimpert*, 75 Ill. 228.

3, *Johnston v. Johnston*, 26 Neb. 745; *Tacoma Coal Co. v. Bradley*, 2 Wash. 600; 26 Am. St. Rep. 890 and note.

4, Dalrymple v. Hillenbrand, 62 N. Y. 5; 20 Am. Rep. 438; Reeve v. Liverpool Ins. Co., 39 Wis. 520; Feldman v. Gamble, 26 N. J. Eq. 494; Continental Life Ins. Co. v. Rogers, 119 Ill. 474.

5, Bennett v. Covington, 22 Fed. Rep. 816; Jones v. Ames, 135 Mass. 431.

6, Culter v. Wright, 22 N. Y. 472; Hough v. Hamlin, 57 Iowa 359.

7, Blanchard v. Young, 11 Cush. 341; Cooper v. Cooper, 9 N. J. Eq. 566.

8, Tootle v. Maben, 21 Neb. 617, and cases cited in note 7 to the last section.

9, Baumier v. Antiau, 79 Mich. 509.

10, Wing v. Steward, 68 Iowa 13.

11, Webster v. Dunn, 71 Me. 331.

12, Murray v. N. Y. Life Ins. Co., 85 N. Y. 236; Jones v. Brooklyn Ins. Co., 61 N. Y. 79; Van Valkenburg v. American Ins. Co., 70 N. Y. 605; National Benev. Assn. v. Grauman, 107 Ind. 288; Jones v. U. S. Mutual Acc. Assn., (Iowa) 61 N. W. Rep 485. On the same ground as well as on the ground of the presumption in favor of innocence, if the company claims that the plaintiff has burned his property, it must assume the burden of proof on that subject, Murray v. N. Y. Ins. Co., 85 N. Y. 236.

§ 178. How affected by form of issue—Whether affirmative or negative.—The early text writers declared the burden of proof to be on the party who asserts the *affirmative* of the issue or question in dispute. "*Ei incumbit probatio qui dicit, non qui negat.*"¹ But it will be seen that the exceptions to this proposition are numerous; and later writers have questioned the accuracy of the rule. They have urged that the burden

of proof *does not depend upon the form* of the proposition, but that the burden of proving any given claim or defense rests upon the one who asserts it.² "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence or non-existence of facts which he asserts or denies to exist, must prove that those facts do or do not exist."³ But perhaps the controversy is of little importance, since it is conceded by those who assert the ancient rule that it has exceptions, and that the burden is upon him who asserts the affirmative *in substance*, rather than in mere form.⁴ It is reasonable that the one who asserts a fact necessary to the claim or defense should prove such fact; and in the great majority of cases it will be found that the fact to be proved is a proposition affirmative in form. But it is well settled that whoever asserts a claim or a defense which depends upon a *negative* must, as in other cases, establish the truth of the allegation by a preponderance of evidence. Thus the burden is upon the one asserting the negative where the allegation is that another did not build according to certain specifications;⁵ that proper care had not been used;⁶ that certain work had not been done in a workmanlike manner;⁷ that a note was without consideration,⁸ or that it had not been taken in payment for an antecedent debt;⁹ that a pretended deed was never executed;¹⁰ that an in-

sured person was not in good health as represented in his application;¹¹ that a tenant had not made repairs according to the covenants of the lease;¹² that a person was not a legal voter;¹³ that goods were not according to warranty;¹⁴ that property was taken without the owner's consent;¹⁵ that a solicitor had not used due diligence;¹⁶ that an insured person had not used due care to avoid accident;¹⁷ that goods entrusted to a common carrier had not been delivered,¹⁸ and that, in an action for malicious prosecution, there was not probable cause in the former suit.¹⁹ In actions for penalties given by statutes, where the statutes contain negative matter, there must be *prima facie* proof to support the negative allegations of the complaint.²⁰ Cases illustrating the same principle might be multiplied almost indefinitely. In some of the cases cited the allegation, negative in form was made by the plaintiff, in others by way of defense; they all illustrate the rule that where a claim or defense rests upon a negative allegation, the one asserting such claim or defense is not relieved of the *onus probandi* by reason of the form of the allegation or the inconvenience of proving a negative. But in such cases a less amount of proof than is usually required may avail. Such evidence as renders the existence of the negative probable may change the burden to the other party.²¹

- 1, Best Ev. sec. 269; Stark. Ev. (3rd ed.) 586.
- 2, Steph. Ev. art. 93; Whart. Ev. sec. 353-7; Burford v. Fergus, 165 Pa. St. 310; Shattuck v. Rogers, 54 Kan. 66.
- 3, Steph. Ev. art. 93.
- 4, Phil. Ev. p. 493; Greenl. Ev. sec. 74.
- 5, Smith v. Davies, 7 Car. & P. 307.
- 6, Heinemann v. Heard, 62 N. Y. 448.
- 7, Amos v. Hughes, 1 Moody & Rob. 464.
- 8, Towsey v. Shook, 3 Blackf. (Ind.) 267; 25 Am. Dec. 108.
- 9, Smith v. Bettger, 68 Ind. 254; 34 Am. Rep. 256; Gibson v. Tobey, 46 N. Y. 637; 7 Am. Rep. 397.
- 10, Kerr v. Freeman, 33 Miss. 292.
- 11, Geach v. Ingall, 14 M. & W. 95; Ashley v. Betes, 15 M. & W. 589.
- 12, Doe v. Rowlands, 9 Car. & P. 734.
- 13, Beardstorm v. Virginia, 76 Ill. 34.
- 14, Dorr v. Fisher, 1 Cush. 271.
- 15, Little v. Thompson, 2 Me. 228; R. v. Hazy, 2 Car. & P. 458.
- 16, Shilcock v. Passman, 7 Car. & P. 289.
- 17, Freeman v. Travelers Ins. Co., 144 Mass. 572. See also, Redman v. Aetna Ins. Co., 49 Wis. 431; Grangers' Life Ins. Co. v. Brown, 57 Miss. 308; 34 Am. Rep. 446; Germain v. Brooklyn Life Ins. Co., 30 Hun 535.
- 18, Roberts v. Chittenden, 88 N. Y. 33.
- 19, Good v. French, 115 Mass. 201.
- 20, Com. v. Maxwell, 2 Pick. 139; 1 Greenl. Ev. sec. 78.
- 21, Vigus v. O'Bannon, 118 Ill. 334; Beardstown v. Virginia, 76 Ill. 34; Kelly v. Owens, (Cal.) 30 Pac. Rep. 596; Greenl. Ev. sec. 78. For other illustrations as to burden of proof where the allegations are negative in form see 1 Greenl. Ev. sec. 80, 81.

§ 179. Burden as to particular facts lying peculiarly within knowledge of a party.—On principles already discussed the burden of proof as to any particular fact rests upon the party asserting such fact.¹ The burden of proof may during the course of the trial be shifted from one side to the other; and where the fact is one peculiarly within the knowledge of one of the parties slight evidence may suffice for that purpose. Many illustrations in this chapter clearly show that, where the *facts lie solely within the knowledge of one party*, this is an important consideration in determining the amount of evidence necessary to be produced by the other party.² “The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the burden of proving that fact shall lie on any particular person; but the burden may in the course of a case be shifted from one side to the other; and in considering the amount of evidence necessary to shift the burden of proof, the court has regard to the opportunities of knowledge with respect to the fact to be proved which may be possessed by the parties respectively.”³ This is often illustrated in prosecutions for selling liquor or doing other acts *without the license* required by law. By a few authorities the rule is prescribed that in such cases the prosecution must offer some slight proof of

the fact that no license has been granted, for example, by producing the book in which licenses are recorded; and if the book fails to show that a license has been granted, the burden is shifted upon the defendant to prove the fact claimed by him;⁴ but the greater number of authorities hold that where a license would be a complete defense, the burden is upon the defendant to prove the fact so clearly within his own knowledge.⁵

1, *Smith v. Roach*, 59 Mo. App. 115; *Green v. Maloney*, 7 Houst. (Del.) 22.

2, *Robinson v. Robinson*, 51 Ill. App. 317.

3, *Steph. Ev. art. 96*. This is illustrated by most of the cases cited in this chapter. See also *Nicodemus v. Young*, (Iowa) 57 N. W. Rep. 906, where it was held that the proponent of a deed is not required to show that the grantor was single or, if married, that the deed was not a deed of the homestead.

4, *Hepler v. State*, 58 Wis. 46; *Com. v. Thurlow*, 24 Pick. 374; *State v. Richison*, 45 Mo. 575; *Mehan v. State*, 7 Wis. 670; *State v. Kuhuke*, 26 Kan. 405; *State v. Nye*, 32 Kan. 201.

5, *United States v. Nelson*, 29 Fed. Rep. 202; *State v. Foster*, 23 N. H. 348; 55 Am. Dec. 191; *Com. v. Tuttle*, 12 Cush. 502; *State v. Bach*, 36 Minn. 234; *State v. Crowell*, 25 Me. 171; *State v. Passic*, 42 N. J. L. 87; *State v. Emery*, 98 N. C. 668; *State v. Camden*, 48 N. J. L. 89; *Com. v. Rafferty*, 133 Mass. 574; *Sharp v. State*, 17 Ga. 290; *Thomas v. State*, 37 Miss. 353; *Williams v. State*, 35 Ark. 530; *Haskill v. Com.*, 3 B. Mon. (Ky.) 342; *Noecker v. People*, 91 Ill. 468; *Smith v. Adrian*, 1 Mich. 495. In Massachusetts by statute the burden of proving the license is on the defendant, *Com. v. Curran*, 119 Mass. 206.

§ 180. Actions against common carriers—Telegraph companies.— Questions

have often arisen as to the burden of proof in actions against railroad companies, express companies and other common carriers for the loss of goods. The *plaintiff* must first show the default of the carrier by *some proof of damage or of loss* or of non-delivery of the goods,¹ although slight evidence suffices.² Thereupon a *prima facie* case is established; and it becomes *incumbent on the carrier* to prove that the loss arose from some cause for which he is not liable.³ For example, in such case the burden is upon the defendant to show, if he so claims, that a given loss was caused by the act of God or of the public enemy; or that owing to some other rule of law he is not liable therefor;⁴ or that, by reason of the contract as expressed in the bill of lading or other form of contract, the liability has been limited, and that the loss arose from some cause exempted or excepted in the contract,⁵ or that the receipt or contract limiting the liability was made under circumstances indicating fairness and good faith.⁶ It is well settled that even when the contract exempts the carrier from liability in certain cases, as for example fire and perils of the sea, he is still liable on grounds of public policy, if the loss by reason of such cause is the result of his negligence.⁷ A conflict has arisen over the question whether the burden is on the carrier, after proof that the loss resulted from an *excepted risk*, to also prove that there has

been *no negligence* on his part. Mr. Greenleaf thus states the view maintained by one class of authorities, which in the opinion of the author is the better reasoning: "And if the acceptance of the goods was special, the burden of proof is still on the carrier to show, not only that the cause of the loss was within the terms of the exception, but also that there was on his part no negligence or want of due care."⁸ These authorities base their opinions on the ground that in such cases the *proof* is generally *in the hands of the common carrier*; that he or his servants know or at least ought to know the circumstances of the loss, while the plaintiff has no such knowledge and consequently, if the plaintiff were required to furnish proof of negligence, it would practically operate as a denial of justice.⁹ Those who maintain this view hold that the common carrier can not by *special contract* relieve himself to any extent from losses occasioned by his own negligence; that common carriers are such by virtue of their occupation and not by virtue of the responsibilities under which they rest, and that although their responsibilities may vary the character of their employment is not changed.¹⁰ But there are numerous adjudications holding that in such cases, when there is proof bringing the loss within an excepted peril, the burden of proof is shifted to the plaintiff to prove negligence.¹¹ When it is shown that

the loss is the result of the act of God or of the public enemy, the carrier is not bound to give proof of due care; the burden of proving negligence in such case is upon the plaintiff.¹² When a *telegraph company* undertakes to transmit a message, it is implied that the message will be sent correctly; and if error occurs, the means of proof and explanation are almost wholly within the reach of the company and equally beyond the reach of the other party. Owing to these considerations it is the rule that, where the plaintiff proves a failure to transmit the message in the form in which it was received and that damage has resulted, there is a case of *prima facie* negligence for which the company is liable, unless there is proof offered rebutting the presumption of negligence.¹³ But a different rule may obtain where the liability is restricted by contract.¹⁴

1. Baltimore Ry. Co. v. Schumacher, 29 Md. 168; 96 Am. Dec. 510; Woodbury v. Frink, 14 Ill. 279; Day v. Ridley, 16 Vt. 48; 42 Am. Dec. 489; South & N. A. Ry. Co. v. Wood, 71 Ala. 215; 46 Am. Rep. 309; Chicago Ry. Co. v. Northern Line Packet Co., 70 Ill. 217.

2. Day v. Ridley, 16 Vt. 48; 42 Am. Dec. 489; Woodbury v. Frink, 14 Ill. 279; Chicago & N. W. Ry. Co. v. Dickinson, 74 Ill. 249; Griffiths v. Lee, 1 Car. & P. 110; 12 E. C. L. 74. See also, Lamb v. Western Ry. Corp., 7 Allen 98.

3. Nelson v. Woodruff, 1 Black. (U. S.) 156; Clark v. Barnwell, 12 How. 272; The Mohler, 21 Wall. 230; Boies v. Hartford Ry. Co., 37 Conn. 272; 9 Am. Rep. 347; Cass v. Boston Ry. Co., 14 Allen 448; Claflin v. Meyers, 75

N. Y. 260; 31 Am. Rep. 467; *Wilson v. Southern Pac. Ry. Co.*, 62 Cal. 164; *Van Winkle v. S. C. Ry. Co.*, 38 Ga. 32; *Little v. Boston Ry. Co.*, 66 Me. 239; *Swindler v. Hilliard*, 2 Rich. L. (S. C.) 286; 45 Am. Dec. 732; *United States Ex. Co. v. Backman*, 28 Ohio St. 144; *Gray v. Mobile Trade Co.*, 55 Ala. 387; *Chicago Ry. Co. v. Moss*, 60 Miss. 1003; 45 Am. Rep. 428; *Little Rock Ry. Co. v. Talbot*, 39 Ark. 523; *Brown v. Adams Ex. Co.*, 15 W. Va. 812; *Mitchell v. United States Ex. Co.*, 46 Iowa 214; *Kirk v. Folsom*, 23 La. An. 584; *Levering v. Union Co.*, 42 Mo. 88; 97 Am. Dec. 320 and note; *Hall v. Cheney*, 36 N. H. 26; *Shriver v. Sioux City Ry. Co.*, 24 Minn. 506; 31 Am. Rep. 353; *Mann v. Birchard*, 40 Vt. 326; *Ayres v. C. & N. W. Ry. Co.*, 71 Wis. 372; 5 Am. St. Rep. 226; *Turney v. Wilson*, 7 Yerg. (Tenn.) 340; 27 Am. Dec. 515; *Ewart v. Street*, 2 Bailey (S. C.) 157; 23 Am. Dec. 131; *Hunt v. Morris*, 6 Mart. (La.) 676; 12 Am. Dec. 489. See also notes, 53 Am. Dec. 672; 97 Am. Dec. 409.

4, *Railroad Co. v. Reeves*, 10 Wall. 176.

5, *Gleeson v. Virginia Midland Ry. Co.*, 140 U. S. 435; *Clark v. Barnwell*, 12 How. 272; *Western Trans. Co. v. Newhall*, 24 Ill. 466; 76 Am. Dec. 760; *Gaines v. Union Trans. Co.*, 28 Ohio St. 418; *Verner v. Sweitzer*, 32 Pa. St. 208; *Bennett v. Filyaw*, 1 Fla. 403; *Alden v. Pearson*, 3 Gray 342; *Swindler v. Hilliard*, 2 Rich. L. (S. C.) 286; 45 Am. Dec. 732; *American Trans. Co. v. Moore*, 5 Mich. 379; *Browning v. Goodrich Trans. Co.*, 78 Wis. 391; *Johnson v. Alabama Ry. Co.*, 69 Miss. 171.

6, *Adams Ex. Co. v. Guthrie*, 9 Bush (Ky.) 78.

7, *Railroad Co. v. Lockwood*, 17 Wall. 357; *South. & N. Ry. Co. v. Henlein*, 52 Ala. 606; 23 Am. Rep. 578; *Mich. Ry. Co. v. Heaton*, 37 Ind. 448; 10 Am. Rep. 89; *Kallman v. United States Ex. Co.*, 3 Kan. 205; *Louisville Ry. Co. v. Brownlee*, 14 Bush (Ky.) 590; *Newman v. Smoker*, 25 La. An. 303; *Fillebrown v. Grand Trunk Ry. Co.*, 55 Me. 462; 92 Am. Dec. 606; *Shriver v. Sioux City Ry. Co.*, 24 Minn. 506; 31 Am. Rep. 353; *South. Ex. Co. v. Moon*, 39 Miss. 822; *School Dist. v. Boston Ry. Co.*, 102 Mass. 552; 3 Am. Rep. 502; *Clark v. St. Louis Ry. Co.*, 64 Mo. 440; *Knowlton v. Erie Ry. Co.*, 19 Ohio St. 260; *Pennsylvania Ry. Co.*

v. Butler, 57 Pa. St. 335; Virginia Ry. Co. v. Sayers, 26 Gratt. (Va.) 328.

8, 2 Greenl. Ev. sec. 219; Missouri Pac. Ry. Co. v. China Manf. Co., 79 Tex. 26; Swindler v. Hilliard, 2 Rich. L. (S. C.) 286; 45 Am. Dec. 732; Davidson v. Graham, 2 Ohio St. 131; Erie Ry. Co. v. Lockwood, 28 Ohio St. 358; Hays v. Kennedy, 41 Pa. St. 378; 80 Am. Dec. 627; Berry v. Cooper, 28 Ga. 543; Grey v. Mobile Trade Co., 55 Ala. 387; 28 Am. Rep. 729; Chicago, St. L. & N. O. Ry. Co. v. Moss, 60 Miss. 1003; 45 Am. Rep. 428.

9, Riley v. Horne, 5 Bing. 217; Berry v. Cooper, 28 Ga. 543; Cumins v. Wood, 44 Ill. 416; Collins v. Bennett, 46 N. Y. 490 and cases just cited above.

10, Davidson v. Graham, 2 Ohio St. 131; Steele v. Townsend, 37 Ala. 247; 79 Am. Dec. 49; Brown v. Adams Ex. Co., 15 W. Va. 812.

11, Clark v. Barnwell, 12 How. 272; Bankard v. B. & O. Ry. Co., 34 Md. 197; Lamb v. Camden Ry. Co., 46 N. Y. 271; 7 Am. Rep. 327; Patterson v. Clyde, 67 Pa. St. 500; Kansas Co. v. Reynolds, 8 Kan. 623; Witting v. St. Louis & S. F. Ry. Co., 101 Mo., 631; 20 Am. St. Rep. 636; Brauer v. The Almoner, 18 La. An. 266; Mitchell v. United States Ex. Co., 46 Iowa 214; Davis v. Wabash Ry. Co., 89 Mo. 340; Whitworth v. Erie Ry. Co., 87 N. Y. 413; Louisville & N. Ry. Co. v. Manchester Mills, 88 Tenn. 653.

12, Railroad Co. v. Reeves, 10 Wall. 176.

13, Telegraph Co. v. Griswold, 37 Ohio St. 301; 41 Am. Rep. 500; Bartlett v. Western Union Tel. Co., 62 Me. 209; 16 Am. Rep. 437; Rittenhouse v. Independence Line of Tel., 44 N. Y. 263; 4 Am. Rep. 673; Tyler v. Western Union Tel. Co., 60 Ill. 421; 14 Am. Rep. 38; Baldwin v. United States Tel. Co., 45 N. Y. 744; 6 Am. Rep. 165; Western Union Tel. Co. v. Carew, 15 Mich. 525; De la Grange v. Southwestern Tel. Co., 25 La. An. 383; Western Union Tel. Co. v. Meek, 49 Ind. 53; Turner v. Hawkeye Tel. Co., 41 Iowa 458; 20 Am. Rep. 605. See note, 45 Am. Rep. 499. See also sec. 209 *infra*.

14, Sweetland v. Illinois Tel. Co., 27 Iowa 433; 1 Am.

Rep. 285; *Baldwin v. United States Tel. Co.*, 45 N. Y. 744; 6 Am. Rep. 165. But see *Western Union Tel. Co. v. Blanchard*, 68 Ga. 299; 45 Am. Rep. 480 and long note.

§ 181. **Same, continued.**—In actions for negligence the general rule obtains that the person asserting the negligence or other wrong has the burden of proof; but as we have seen in actions for negligence slight proof sometimes suffices to raise a presumption of negligence, and the burden is thus cast upon the other party to overcome this presumption.¹ Thus in actions against common carriers for *personal injuries* received by a *passenger*, the burden is upon him to show that he received the injury while a passenger and by reason of the negligence of the carrier; but a *prima facie* case is made out when it appears that an accident occurred to the plaintiff without fault on his part while he was a passenger by reason of the failure of some portion of the machinery or other means provided for transportation.² For example, when the injury is shown to be the result of the breaking of an axletree of a coach,³ or the upsetting of a coach,⁴ or the collision of cars on the road of the defendant,⁵ or of their running off the track,⁶ or of the falling of a berth of a vessel⁷ or in a railroad car;⁸ in all such cases the contract of the carrier implies that the means of transportation are proper and adequate; that the appliances of the defendant in every respect are fit for the purpose,

and that its servants are competent. Since the defendant is in a situation to ascertain and explain the cause of the injury, while the plaintiff is not, it is reasonable that the burden of such explanation should rest upon the defendant.⁹ It follows that, when the plaintiff in such cases shows that an accident has happened to him as a passenger by reason of some defect or failure in the vehicle or by reason of some mismanagement, it is *not necessary* for him to prove the *specific defect* or mismanagement; an inference of a want of care arises from the injury and surrounding circumstances, and the burden of explanation is thrown upon the carrier.¹⁰ The rule was thus stated in an English case: "There must be reasonable evidence of negligence; but where the thing is shown to be under the management of defendant or his servants and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."¹¹ The rule laid down in the foregoing cases grows out of the peculiar relation between the carrier and the passenger and of the contract to carry safely; and, unless such relation exists, the plaintiff in an action against a common carrier must furnish other proof of negligence than the fact of the injury.¹² *Where there is no such*

contract for the special care and safety of the plaintiff on the part of the carrier, the prosecutor must establish more than a *prima facie* case; and the burden of proof rests on him to show due care on his part. It devolves upon him to trace the cause of his injury directly to the fault or neglect of the defendant; and to do this he must establish by evidence circumstances from which it may be fairly inferred that there is reasonable probability that the accident resulted from the want of some precaution which the defendant might and ought to have resorted to; and further the plaintiff should also show with reasonable certainty what particular precautions should have been taken to avoid the accident.¹³ The same is true in other accidents where cattle or horses are killed or other damage is done to property when the property is not being transported by the defendant.¹⁴

1, See sec. 14 *supra*, and cases cited.

2, *Railroad Co. v. Pollard*, 22 Wall 341; *Stokes v. Saltonstall*, 13 Peters 181; *Meier v. Pennsylvania Ry. Co.*, 64 Pa. St. 225; 3 Am. Rep. 581, *Toledo Ry. Co. v. Beggs*, 85 Ill. 80; 28 Am. Rep. 613; *Smith v. St. Paul City Ry.*, 32 Minn. 1; 50 Am. Rep. 550; *Bowen v. New York Cent. Ry. Co.*, 18 N. Y. 408; 72 Am. Dec. 529 and note; *Feital v. Middlesex Ry. Co.*, 109 Mass. 398; 12 Am. Rep. 720; *St. Louis Ry. Co. v. Mitchell*, 57 Ark. 418; *Spellman v. Lincoln Transit Co.*, 36 Neb. 890; *Philadelphia Ry. Co. v. Anderson*, 72 Md. 519; 20 Am. St. Rep. 483; *Alabama Ry. Co. v. Hill*, 93 Ala. 514; 30 Am. St. Rep. 65 and note; *Pullman Palace Car Co. v. Lowe*, 28 Neb. 239; 26 Am. St. Rep. 325 and full note; *Furnish v. Missouri Pac. Ry. Co.*,

102 Mo. 438; 22 Am. St. Rep. 781 and note; Levering v. Union Transportation Co., 42 Mo. 88; 97 Am. Dec. 320 and note; Wolf v. Am. Express Co., 43 Mo. 421; 97 Am. Dec. 406 and note; Marquette Ry. Co. v. Kirkwood, 45 Mich. 51; 40 Am. Rep. 453 and note; Cameron v. Rich, 4 Strob. (S. C.) 168; 53 Am. Dec. 670 and note; Stockton v. Frey, 4 Gill (Md.) 406; 45 Am. Dec. 138 and note; Burroughs v. Housatonic Ry. Co., 15 Conn. 124; 38 Am. Dec. 64 and note; Ingalls v. Bills, 9 Met. 1; 43 Am. Dec. 346 and note. See notes, 64 Am. Dec. 505; 62 Am. Dec. 679; 20 Am. St. Rep. 490; 43 Am. Rep. 73; 50 Am. Rep. 550; 49 Am. Dec. 538; 75 Am. Dec. 267; 6 Am. St. Rep. 792; 2 L. R. A. 820. See also article, 6 Harv. L. Rev. 125.

3, Christie v. Griggs, 2 Camp. 79.

4, Stokes v. Saltonstal, 13 Peters 181; Bush v. Barnett, 96 Cal. 202.

5, Skinner v. London Ry. Co., 5 Exch. 787; Railroad Co. v. Pollard, 22 Wall. 341; Smith v. St. Paul Ry. Co., 32 Minn. 1; 50 Am. Rep. 550.

6, Curtis v. Rochester Ry. Co., 18 N. Y. 534; 75 Am. Dec. 258; Murphy v. Coney Island Ry. Co., 36 Hun 199.

7, Smith v. British Packet Co., 86 N. Y. 408. See also note, 15 L. R. A. 38.

8, Railroad Co. v. Walrath, 38 Ohio St. 461; 43 Am. Rep. 433.

9, Delaware, L. & W. Ry. Co. v. Napheys, 90 Pa. St. 135; Gillespie v. St. Louis, K. C. & N. Ry. Co., 6 Mo. App. 554; Thomp. Carriers Pass. 211; Ware v. Barataria & L. Canal Co., 15 La. 169; 35 Am. Dec. 189 and note.

10, Meier v. Pennsylvania Ry. Co., 64 Pa. St. 225; 3 Am. Rep. 581; Feital v. Middlessex Ry. Co., 109 Mass. 398; 12 Am. Rep. 720; Holbrook v. Utica Ry. Co., 12 N. Y. 236; 64 Am. Dec. 502; Smith v. St. Paul Ry. Co., 32 Minn. 1; 50 Am. Rep. 550; Railroad Co. v. Pollard, 22 Wall. 341; Skinner v. London Ry. Co., 5 Exch. 787. See note, 15 L. R. A. 35.

11, Scott v. London Dock Co., 3 Hurl. & C. 595.

12, Nitro Glycerine Case, 15 Wall. 524.

13, *Louisville Ry. Co. v. Allen*, 78 Ala. 494; *State v. Maine Cent. Ry. Co.*, 76 Me. 357; 49 Am. Rep. 622 and note; *Philadelphia Ry. Co. v. Stebbing*, 62 Md. 504; *Daniel v. Metropolitan Ry. Co.*, 3 C. B. 591; Cooley Torts sec. 673. See note, 8 L. R. A. 636, as to injury to a servant.

14, *Savannah, Fla. & West. Ry. Co. v. Geiger*, 21 Fla. 669; 58 Am. Rep. 697 and note. See notes, 17 L. R. A. 339; 15 L. R. A. 39, as to injury to live stock; 13 L. R. A. 33, as to injury to other property.

§ 182. **Same — Negligence — Setting of fires, etc.**—The principle under discussion is not confined in its application to common carriers. For example, in an English case already cited the plaintiff was injured by bags of sugar falling from a crane in which they were being lowered to the ground from the warehouse of the defendant;¹ so where the wall of a cistern which is being constructed by a city falls by its own weight or by the pressure of gravel and earth behind it, whereby a person is injured, the burden of explanation is cast upon the city.² On the same principle it has been held that, from the mere fact of the explosion of a steam boiler within the control of the defendant, it is competent for the jury to infer some negligence in the management of the boiler or some defect in its condition;³ but by the weight of authority such evidence does not shift the burden of proof upon the defendant.⁴ The question has often arisen as to the burden of proof in actions against *railroad companies* for injuries caused by *fires* communicated from their

engines. The prevailing rule is that it is incumbent upon the plaintiff to show that the fire was caused by the engine; the *onus* then rests upon the defendant to show that the engine was properly constructed and managed.⁵ This rule rests upon the principle to which we have already called attention that when the facts lie peculiarly within the knowledge of one of the parties, this is an important consideration in determining the amount of evidence necessary to shift the burden of proof.⁶ There is, however, a conflict of opinion on this subject; and in some states mere proof that the fire has been communicated from the engine of the defendant does not constitute a *prima facie* case.⁷ Of course the *prima facie* case is repelled by proof that the engine was provided with the best appliances to prevent the communication of fire, and that it was properly managed.⁸

1, Scott v. London Dock Co., 3 Hurl. & C. 596.

2, Mulcairns v. Janesville, 67 Wis. 24.

3, Rose v. Transportation Co., 11 Fed. Rep. 438; Fay v. Davidson, 13 Minn. 523. See note on injury by explosion, 15 L. R. A. 35.

4, Huff v. Austin, 102 Ind. 435; Spencer v. Campbell, 9 Watts & S. (Pa.) 32; Mullen v. St. John, 57 N. Y. 567; 15 Am. Rep. 530; Marshall v. Wellwood, 38 N. J. L. 339; 20 Am. Rep. 394; Somers v. Railway Co., 7 Lea (Tenn.) 204; Railroad Co. v. Walrath, 38 Ohio St. 461; 43 Am. Rep. 433. See note on injury in a highway, 15 L. R. A. 33.

5, Spaulding v. Chicago & N. W. Ry. Co., 30 Wis. 110; 11 Am. Rep. 550; Green Ridge Ry. Co. v. Brinkman, 64 Md. 52; Eddy v. Lafayette, 49 Fed. Rep. 807; Union Pac.

Ry. Co. v. Keller, 36 Neb. 189; *Clevelands v. Grand Trunk Ry. Co.*, 42 Vt. 449; *Baltimore & S. Ry. Co. v. Woodruff*, 4 Md. 242; 59 Am. Dec. 72; *Field v. New York Cent. Ry. Co.*, 32 N. Y. 339; *Coates v. Missouri, K. & T. Ry. Co.*, 61 Mo. 38; *Woodson v. Chicago, M. & St. P. Ry. Co.*, 21 Minn. 60; *St. Louis, A. & T. H. Ry. Co. v. Strotz*, 47 Ill. App. 342; *Louisville, N. O. & T. Ry. Co. v. Natchez, J. & C. Ry. Co.*, 67 Miss. 399; *White v. Chicago, M. & St. P. Ry. Co.*, 1 S. Dak. 326; *Koontz v. Oregon Ry. & Nav. Co.*, 20 Ore. 3; *Jacksonville, T. & K. W. Ry. Co. v. Peninsular Land, Transp. & Mfg. Co.*, 27 Fla. 1. See also, *Hagen v. Chicago, D. & C. G. T. J. Ry. Co.*, 86 Mich. 615. See notes, 38 Am. Dec. 71; 15 L. R. A. 40. As to proof of other fires, see sec. 163 *supra*.

6, *Pittsburg Ry. Co. v. Campbell*, 86 Ill. 443; *Slosson v. Burlington Ry. Co.*, 51 Iowa 294; *Annapolis Ry. Co. v. Gantt*, 39 Md. 115; *Anderson v. W. & J. V. Ry. Co.*, 2 Utah 518; *Laird v. Railroad*, 62 N. H. 254; 13 Am. St. Rep. 564 and note. See also, *City of Fort Smith v. Dodson*, 51 Ark. 447; 14 Am. St. Rep. 62 and note, and cases above cited. See sec. 179 *et seq. supra*. In some states the burden of proof is imposed upon the defendant in such cases by statute.

7, *Indianapolis Ry. Co. v. Paramore*, 31 Ind. 143; *Jefferys v. Philadelphia, W. & B. Ry. Co.*, 3 Houst. (Del.) 447; *Ruffner v. Cincinnati, H. & D. Ry. Co.*, 34 Ohio St. 96; *Albert v. N. C. Ry. Co.*, 98 Pa. St. 316; *Henderson v. Philadelphia Ry. Co.*, 144 Pa. St. 461; 27 Am. St. Rep. 652 and note. See also, 5 Am. L. Rev. 208.

8, *Chicago & A. Ry. Co. v. Quaistance*, 58 Ill. 389; *Toledo, W. & W. Ry. Co. v. Larmon*, 67 Ill. 68; *Kenny v. Hannibal Ry. Co.*, 70 Mo. 243; *Libby v. Chicago, R. I. & P. Ry. Co.*, 52 Iowa 92; *Small v. Chicago, R. I. & P. Ry. Co.*, 50 Iowa 338; *Savannah Ins. Co. v. Pelzer Co.*, 60 Fed. Rep. 39; *Toledo, St. L. & K. C. Ry. Co. v. Kingman*, 49 Ill. App. 43; *Meyer v. Vicksburg, S. & P. Ry. Co.*, 41 La. An. 639; *Koontz v. Oregon Ry. Co.*, 20 Ore. 31. When the engine is shown to be in perfect condition the plaintiff has the burden of proving that a newer pattern of engine in use at that time is more safe, *Babcock v. Fitchburg Ry. Co.*, 140 N. Y. 308.

§ 183. **Contributory negligence.**—It is very clear that when it appears from the plaintiff's own showing that he has been guilty of negligence which, as a proximate cause, contributed to the injury, he cannot recover, and a nonsuit should be granted; and where the plaintiff's own evidence raises an inference of negligence against him, he is required to overcome this inference in order to establish his *prima facie* case.¹ But assume that the plaintiff's evidence raises no such inference of negligence on his part and that the inference is that he has suffered injury by reason of the negligence of the defendant—is the plaintiff then bound to prove affirmatively that he has been guilty of no negligence? The affirmative of this proposition has been maintained in many cases, and in several states this rule is adhered to. This view rests upon the ground that there can be no recovery unless two conditions concur, to-wit: negligence of the defendant, and freedom of the plaintiff from contributory fault; these courts hold that it is incumbent on the plaintiff to show the existence of both conditions.² But in the judgment of the author the greater weight of authority sustains the contrary rule. Where the plaintiff shows that he has suffered injury by reason of the negligence of the defendant he has made out a *prima facie* case; and the *burden is upon the defendant* to prove the contributory negligence which he asserts.³ This

rule seems not only to be sustained by the greater weight of authority, but to more nearly accord with the general principle that the burden of proving a given fact rests upon the one who asserts such fact.⁴ Moreover it is a familiar rule that *negligence will not be presumed*. To call upon the plaintiff to prove that he has been guilty of no negligence would seem to reverse the order of proof which this presumption usually and logically establishes.⁵ The rule does not apply to a case in which the proofs on behalf of the plaintiff show or tend to show his contributory negligence. If such negligence conclusively appears, the court will *nonsuit* the plaintiff or direct the jury to find for the defendant; if the evidence only tends to show such contributory negligence, the question must go to the jury to be determined, like any other question of fact, upon a preponderance of the evidence.⁶ It should be observed that in some of those decisions which declare that the burden of proving due care is cast upon the plaintiff, it is held that the plaintiff need not in the first instance give evidence for the direct and special object of establishing the observance of due care, but that it is enough if the proof introduced of the negligence of the defendant and of the circumstances of the injury, *prima facie* establishes the fact that the injury was caused by the negligence of the defendant, as such evidence would exclude the idea of the

want of due care by the plaintiff.⁷ Among other circumstances which may be considered in this connection are the natural instinct of self-preservation and the general disposition of men to avoid danger.⁸ This subject has often arisen in cases relating to the *death of a person* where it is claimed that he has been killed *by the negligence of another*; and in such cases where there is no evidence as to how the accident occurred, it has frequently been declared that the deceased should be presumed to have exercised due care and the court will not assume that the deceased came to his death through his own contributory negligence.⁹ But where the circumstances of the accident are not sufficiently shown to warrant any inference on the question of care or negligence, there can be no recovery;¹⁰ of course if there is direct testimony of contributory negligence, the presumption of due care is rebutted;¹¹ and the very circumstances of the accident may be such as to negative any presumption of due care.¹²

1, *Achtenhagen v. Watertown*, 18 Wis. 331; 86 Am. Dec. 769; *Milwaukee Ry. Co. v. Hunter*, 11 Wis. 160; 78 Am. Dec. 699 and note; *Missouri Pac. Ry. Co. v. Foreman*, 73 Tex. 311; 15 Am. St. Rep. 785; *Ryan v. Louisville Ry. Co.*, 44 La. An. 806; *State v. Maine Cent. Ry. Co.* 76 Me. 357; 49 Am. Rep. 622 and note; *Gahagan v. Boston Ry. Co.*, 1 Allen 187; 79 Am. Dec. 724 and note; *Buesching v. St. Louis Gas Co.*, 73 Mo. 219; 39 Am. Rep. 503 and long note. See also, *Waterman v. Chicago & Alton Ry. Co.*, 82 Wis. 613; *Indianapolis & St. L. Ry. Co. v. Horst*, 93 U. S. 291.

2, *Lane v. Crombie*, 12 Pick. 177; *Lane v. Atlantic Works*, 107 Mass. 104; *Kepperley v. Ramsden*, 83 Ill. 354; *Fox v. Glastenbury*, 29 Conn. 204; *Vicksburg v. Hennessy*, 54 Miss. 391; 28 Am. Rep. 354; *Detroit Ry. Co. v. Van Steinburg*, 17 Mich. 99; *Cincinnati Ry. Co. v. Butler*, 103 Ind. 31; *Hawes v. Burlington Ry. Co.*, 64 Iowa 315; *Teipel v. Hilsendegen*, 44 Mich. 461; *Wendell v. New York Ry. Co.*, 91 N. Y. 420; *Lesan v. Maine Cent. Ry. Co.*, 77 Me. 85; *Bover v. Danville*, 53 Vt. 183; *Owens v. Richmond Ry. Co.*, 88 N. C. 502; *Guggenheim v. Lake Shore & M. S. Ry. Co.*, 66 Mich. 150; *Indiana Ry. Co. v. Greene*, 106 Ind. 279; *Toledo Ry. Co. v. Bannagan*, 75 Ind. 490.

3, *Inland Coasting Co. v. Tolson*, 139 U. S. 551; *Railroad Co. v. Gladmon*, 15 Wall. 401; *Indianapolis & St. L. Ry. Co. v. Horst*, 93 U. S. 291; *McQuilken v. Central Pac. Ry. Co.*, 50 Cal. 7; *St. Paul v. Kuby*, 8 Minn. 154; *Alabama Ry. Co. v. Frazier*, 93 Ala. 45; 30 Am. St. Rep. 28 and note; *Thompson v. North Mo. Ry. Co.*, 51 Mo. 190; 11 Am. Rep. 443; *Cleveland Ry. Co. v. Rowan*, 66 Pa. St. 393; *St. Louis & S. F. Ry. Co. v. Weaver*, 35 Kan. 412; *Mitchell v. Clinton*, 99 Mo. 153; *Prideaux v. Mineral Point*, 43 Wis. 513; 28 Am. Rep. 550 and note; *Georgia Pac. Ry. Co. v. Davis*, 92 Ala. 300; *Sanders v. Reister*, 1 Dak. 151; *Bradwell v. Pittsburg & W. E. Ry. Co.*, 139 Pa. St. 404; *Washington Ry. Co. v. Harmon*, 147 U. S. 571; *Merrill v. Eastern Ry. Co.*, 139 Mass. 252; *City of Omaha v. Ayer*, 32 Neb. 375. See also, *Goshen v. England*, 119 Ind. 368; *Dugan v. Chicago, St. P., Minn. & O. Ry. Co.*, 85 Wis. 609; *Lormer v. St. Paul Ry. Co.*, 48 Minn. 391; *Seymer v. Lake*, 66 Wis. 651; *Waterman v. Chicago & Alton Ry. Co.*, 82 Wis. 613. See note, 2 L. R. A. 521.

4, See sec. 179 *supra*; see cases cited above, and also note, 58 Am. Rep. 229.

5, *Milwaukee Ry. Co. v. Hunter*, 11 Wis. 160; 78 Am. Dec. 699; *Hoyt v. Hudson*, 41 Wis. 105; 22 Am. Rep. 714. See also cases cited above, and also sec. 181 *supra*.

6, *Hoyt v. Hudson*, 41 Wis. 105; 22 Am. Rep. 714.

7, *Button v. Hudson Riv. Ry. Co.*, 18 N. Y. 248; *Johnson v. Hudson Riv. Ry. Co.*, 20 N. Y. 65; 75 Am. Dec. 375; *Texas Ry. Co. v. Crowder*, 63 Tex. 502.

8, *Button v. Hudson Riv. Ry. Co.*, 18 N. Y. 248. See elaborate note on this subject citing many cases, 16 L. R. A. 261.

9, *Guggenheim v. Lake Shore Ry. Co.*, 66 Mich. 150; *Phillips v. Milwaukee & Northern Ry. Co.*, 77 Wis. 349; *Longenecker v. Pennsylvania Ry. Co.*, 105 Pa. St. 328; *Flynn v. Kansas City Ry. Co.*, 78 Mo. 195; *Morrison v. New York Cent. Ry. Co.*, 63 N. Y. 643. Contra, *Chase v. Maine Cent. Ry. Co.*, 77 Me. 62; 52 Am. Rep. 744.

10, *Crafts v. Boston*, 109 Mass. 519; *Corcoran v. Boston Ry. Co.*, 133 Mass. 507.

11, *Reading Ry. Co. v. Ritchie*, 102 Pa. St. 425.

12, *Connelly v. New York Cent. Ry. Co.*, 88 N. Y. 346; *Riceman v. Havemeyer*, 84 N. Y. 647; *State v. Maine Ry. Co.*, 76 Me. 357; 49 Am. Rep. 622 and note; *Brown v. Milwaukee & St. P. Ry. Co.*, 22 Minn. 165.

§ 184. **Burden in cases of bailment—**
Warehousemen.—Ordinary bailees for hire are not insurers of goods entrusted to their keeping and are only required to use ordinary care, hence a bailor who alleges negligence on the part of the bailee must offer some proof of his claim. But when he shows a total default in delivering or accounting for the goods on demand, he makes out a *prima facie* case of negligence which imposes upon the bailee the burden of explaining the non-delivery.¹ Where, however, the refusal of the bailee to deliver is explained by the fact appearing that the goods have been lost, destroyed by fire or stolen and the bailee is therefore unable to deliver them, there is no *prima facie* evidence of his want of care; and the court will not assume, in the absence of proof

on the point, that such loss, fire or theft was the result of his negligence.² But in such cases the burden of proof to show the loss is upon the other party, and he must prove such loss with reasonable certainty.³ On the same principle where the *bailee returns the goods in a damaged condition* and gives no explanation of their injury, it has been held that the burden is upon him to show that he had used due care.⁴ This rule is illustrated in a New York case where the owner of a horse brought an action for conversion against one who had hired the horse and returned it in a foundered condition. The court said: "Here, it will be observed, this horse was in the exclusive possession of the defendant. He had charge and care of him for hire. During that charge he was injured in a way that ordinarily does not occur without negligence, usually not without the horse has been used and then neglected. This may be safely said on the evidence and upon human experience. In such case the burden rests with the custodian to show how the injury occurred, and that he was not guilty of the negligence that caused it. This rests upon the defendant for two reasons: first, because the facts are within the defendant's peculiar knowledge, and he should, therefore, prove them; second, such injury does not usually occur without negligence on the part of the custodian of the animal."⁵ It fre-

quently happens that the very *circumstances of the loss* are such as to afford *proof of negligence*, as where goods are stolen the circumstances may be such as to show that the bailee has not kept such watch over the goods as was commensurate to their value.⁶

1, *Clafin v. Meyer*, 75 N. Y. 260; 31 Am. Rep. 467; *Schmidt v. Blood*, 9 Wend. 268; 24 Am. Dec. 143 and note; *Boies v. Hartford Ry. Co.*, 37 Conn. 272; 9 Am. Rep. 347; *Brown v. Waterman*, 10 Cush. 117; *McDaniels v. Robinson*, 26 Vt. 316; 62 Am. Dec. 574; *Funkhouser v. Wagner*, 62 Ill. 59. So the bailee is liable when the goods are delivered by him to the wrong person, *Hawkins v. Hoffman*, 6 Hill. 586; *Furman v. Union Pac. Ry. Co.*, 106 N. Y. 579.

2, *Clafin v. Meyer*, 75 N. Y. 260; 31 Am. Rep. 467; *Lamb v. Camden Ry. Co.*, 46 N. Y. 271; 7 Am. Rep. 327.

3, *Clafin v. Meyer*, 75 N. Y. 260; 31 Am. Rep. 467; *Clark v. Spence*, 10 Watts (Pa.) 335.

4, *Collins v. Bennett*, 46 N. Y. 490; *Logan v. Mathews*, 6 Pa. St. 417; *Cummins v. Wood*, 44 Ill. 416; *Burlingame v. Horne*, 30 Ill. App. 330; *Wiser v. Chesley*, 53 Mo. 547.

5, *Collins v. Bennett*, 46 N. Y. 490.

6, *Safe Deposit Co. v. Pollock*, 85 Pa. St. 391; 27 Am. Rep. 660; *Brown v. Waterman*, 10 Cush. 117.

§ 185. **Innkeepers.**—The general principle under discussion is illustrated by the common law liability of innkeepers. If the goods of a guest disappear the guest cannot ordinarily be presumed to know the party whose guilt or negligence has caused the loss; and he is not bound to prove the negligence or misconduct of the landlord or his servants in order to recover.¹ Where the

loss is shown, the *burden* is cast upon the *innkeeper* to show that it was due to the negligence of the guest or to some other cause relieving the innkeeper of the liability;² it is not enough to show that the loss or damage did not happen through his negligence or that of his servants.³ But this rule, it seems, does not apply to the loss or to the damage of the goods of *permanent boarders* and other parties who have a special contract as to board.⁴ The rule has been thus stated in a leading case: "The general doctrine deducible from the authorities, ancient and modern, is that keepers of public inns are bound well and safely to keep the property of their guests accompanying them at the inn; and in case such property is lost or injured, the innkeeper can only absolve himself from liability by showing that the loss or injury occurred without any fault on his part, or by the fault of the guest, his companions or servants or by superior force; and the burden of proof to exonerate the innkeeper is upon him, for in the first instance the law will attribute the loss or injury to his fault."⁵

1, 2 Thomp. Trials sec. 1843.

2, *Dunbier v. Day*, 12 Neb. 596; *Norcross v. Norcross*, 53 Me. 163.

3, *Shaw v. Berry*, 31 Me. 478; *Sibley v. Aldrich*, 33 N. H. 553; *Piper v. Manny*, 21 Wend. 282. But see, *Howth v. Franklin*, 20 Tex. 798, 802.

4, *Chamberlain v. Masterson*, 26 Ala. 376; *Manning v. Wells*, 9 Humph. (Tenn.) 746.

5, *Johnson v. Richardson*, 17 Ill. 302; 63 Am. Dec. 369, 371; *Hill v. Owen*, 5 Blackf. (Ind.) 323; 35 Am. Dec. 124 and note; *Laird v. Eichold*, 10 Ind. 212; 71 Am. Dec. 323 and note; *Russell v. Fagan*, (Del.) 8 At. Rep. 258; *Bowell v. DeWald*, 2 Ind. App. 303; *Coskery v. Nagle*, 83 Ga. 696; 20 Am. St. Rep. 333 and note; *Dunbier v. Day*, 12 Neb. 596; *Norcross v. Norcross*, 53 Me. 163. The liability of innkeepers for the loss of the property of guests is discussed and the English and American decisions bearing upon the subject are collected in 30 Cent. L. Jour. 160 and note.

§ 186. **Insanity — Civil cases — Criminal.**—It is a familiar rule that he who asserts insanity as a defense to a contract or who relies upon insanity to maintain his action or defense in civil proceedings must assume the burden of proof. Although this is a mooted question in respect to the proof of wills, there is no such controversy in other civil proceedings.¹ There have been wide differences of judicial opinion as to the burden of proof where insanity is urged as a defense in *criminal* cases. The extreme rule has sometimes been declared that in such cases it is incumbent on the prisoner to prove the insanity beyond a *reasonable doubt*;² but manifestly no such rule can be upheld. It is now maintained by one line of authorities that, in order to overcome the presumption of sanity, the burden is upon the defendant to prove to the satisfaction of the jury by a preponderance of the whole evidence upon that issue that at the time of the alleged crime he was not of sane mind.³ While this is the rule which formerly prevailed and which still obtains in the greater number of

states, it has been abandoned in some of those states in which it was formerly recognized. And the tendency of judicial decisions is no doubt in the direction of a less stringent rule. Numerous authorities of the highest character now maintain that upon this, as upon other issues, the burden is upon the state, and that the prisoner should be acquitted if there is any well founded or reasonable doubt as to his sanity.⁴ These authorities rest upon the consideration, which is no doubt entitled to great weight, that from the beginning to the end of the case the prisoner is entitled to invoke the *presumption of innocence*. Said Cooley C. J.: "There is no such thing in law as a separation of the ingredients of the offense so as to leave a part to be established by the prosecution, while as to the rest the defendant takes upon himself the burden of proving a negative. The idea that the burden of proof shifts in these cases is unphilosophical and at war with fundamental principles of criminal law. The presumption of innocence is a shield to the defendant throughout the proceedings, until the verdict of the jury establishes the fact that beyond a reasonable doubt he not only committed the act, but that he did so with malicious intent."⁵ According to this view, although the law raises the presumption of sanity which stands as evidence tending to establish the *prima facie* case, if further evi-

dence is offered by either party tending to repel the presumption, when the whole evidence is before the jury, the burden is with the prosecution to show that the accused was sane.⁶

1, *Weed v. Mutual Life Ins. Co.*, 70 N. Y. 561; *Wright v. Wright*, 139 Mass. 177; *Titlow v. Titlow*, 54 Pa. St. 216; 93 Am. Dec. 691; *Brown v. Brown*, 39 Mich. 792; *Youn v. Lamont*, 56 Minn. 216; *Nonnemacher v. Nonnemacher*, 159 Pa. St. 634. As to burden of proof in will cases, see next section.

2, *State v. Danby*, 1 *Houst. Cr. Cas. (Del.)* 175; *State v. Pratt*, 1 *Houst. Cr. Cas. (Del.)* 269; *State v. DeRance*, 34 *La. An.* 186; 44 *Am. Rep.* 426 and note; *State v. Paulk*, 18 *S. C.* 514. See cases cited in *Boswell v. State*, 63 *Ala.* 307; 35 *Am. Rep.* 20 and note; also article on "Burden of Proof in Cases of Insanity," 9 *Am. L. Reg. (N. S.)* 201, 329; also article by Henry Wade Rogers, 14 *Cent. L. Jour.* 2.

3, *Ford v. State*, 71 *Ala.* 385; 5 *Crim. Law Mag.* 32; *State v. Martin*, (N. J.) 3 *Crim. Law Mag.* 44; *Dejarnette v. Com.*, 75 *Va.* 869; *State v. Hoyt*, 47 *Conn.* 518; *State v. Lawrence*, 57 *Me.* 574; *Com. v. Eddy*, 7 *Gray* 583; *Bond v. State*, 23 *Ohio St.* 349; *State v. McCoy*, 34 *Mo.* 531; 86 *Am. Dec.* 121 and note; *Lynch v. Com.*, 77 *Pa. St.* 205; *Com. v. Gerade*, 145 *Pa. St.* 289; 27 *Am. St. Rep.* 689 and note; *State v. Holme*, 54 *Mo.* 153; *Webb v. State*, 9 *Tex. App.* 490; *Coyle v. Com.*, 100 *Pa. St.* 573; 45 *Am. Rep.* 397; *State v. Redemeier*, 71 *Mo.* 173; 36 *Am. Rep.* 462 and note; *People v. Messersmith*, 61 *Cal.* 246; *Boswell v. State*, 63 *Ala.* 307; 35 *Am. Rep.* 20 and note; *McKenzie v. State*, 26 *Ark.* 334; *Ortwein v. Com.*, 76 *Pa. St.* 414; 18 *Am. Rep.* 420; *Holsenbake v. State*, 45 *Ga.* 43; *Com. v. Heath*, 11 *Gray* 303; *Parsons v. State*, 81 *Ala.* 577; 60 *Am. Rep.* 193 and note; *Chase v. People*, 40 *Ill.* 352. But see, *State v. Marler*, 2 *Ala.* 43; 36 *Am. Dec.* 398 and note. See note, 10 *L. R. A.* 576.

4, *People v. Garbutt*, 17 *Mich.* 9; 97 *Am. Dec.* 162 and note; *State v. Bartlett*, 43 *N. H.* 224; 80 *Am. Dec.* 154;

State v. Jones, 50 N. H. 369; 9 Am. Rep. 242; *O'Connell v. People*, 87 N. Y. 377; 41 Am. Rep. 379; *Brotherton v. People*, 75 N. Y. 159; *Wright v. People*, 4 Neb. 407; *Cunningham v. State*, 56 Miss. 269; 31 Am. Rep. 360 and note; *State v. Crawford*, 11 Kan. 32; *Guetig v. State*, 66 Ind. 94; 32 Am. Rep. 99; *State v. Jones*, 64 Iowa 349; *Walker v. People*, 88 N. Y. 81. In some states statutes regulate the subject. *Davis v. United States*, 160 U. S. 469.

5, *People v. Garbut*, 17 Mich. 9; 97 Am. Dec. 162. See also *People v. Finly*, 38 Mich. 482, and articles in Cent. L. Jour. 2; 16 *id.* 282; 5 Am. L. Rev. 205; 17 *id.* 892.

6, *Hopps v. People*, 31 Ill. 385; *State v. Bartlett*, 43 N. H. 224; 80 Am. Dec. 154.

§187. Burden in probate of wills—Testamentary capacity.—It would be a hopeless task to undertake to reconcile the decisions which relate to the burden of proof in respect to the probate of wills. By one line of reasoning it is maintained that inasmuch as prior to the statute in the time of Henry VIII one could not make a will, and that by that statute persons making wills were not required to be of sound mind, it follows that the person offering a will for probate must assume the burden of proving that the statutory formalities have been complied with, that the testator was of sound mind and that he was such a person as the statute authorizes to make a will. These courts also hold that the heirs of the deceased may rest secure in their inheritance, until it is proved that a will has been legally executed by a competent person.¹ On the other hand it is

insisted that testators, like other persons, are presumed to be sane until the contrary appears, and that the burden of proof is upon the one alleging insanity.² The latter view is perhaps supported by the greater numerical authority, but it is by no means clear that it is sustained by the better reasoning. The rule prevails in some jurisdictions that the party asserting the validity of the will is required in the first instance to make a *prima facie* case of the testator's sanity, but when this has been done and contradictory testimony is offered, the proof of sanity will prevail, unless the rebutting testimony is sufficient to overcome or neutralize the presumption of sanity as well as the affirmative testimony in support of the will.³ Some of the authorities which place the burden of proof upon the proponent of the will do not deny that the ordinary *presumption in favor of sanity* may have some application in such cases, but they urge that the presumption cannot have the force of an independent fact to serve as a make-weight against counter-proof, at least that the presumption only aids to make out a *prima facie* case;⁴ while other cases deny that under the statute of wills any such presumption exists.⁵ The usual practice is for the proponent to produce the subscribing witnesses, make the formal proof of compliance with the statutory formalities and give some proof of testament-

ary capacity. But he is not thereby precluded from calling witnesses after the contestant has given evidence tending to show insanity.⁶ Here the conflict arises, one line of authority holding that the burden remains upon the proponent throughout the case;⁷ the other insisting that after the formal proofs are made the burden shifts to the contestant.⁸ On the issue of fraud or undue influence the ordinary rule obtains that the burden of proof is upon the party asserting a fact, hence the burden in such cases is upon the contestant.⁹

1, *Delafield v. Parish*, 25 N. Y. 9; *Crowninshield v. Crowninshield*, 2 Gray 524; *Cilley v. Cilley*, 34 Me. 162; *Barnes v. Barnes*, 66 Me. 286; *Williams v. Robinson*, 42 Vt. 658; 1 Am. Rep. 359; *Knox's Appeal*, 26 Conn. 20; *McGinness v. Kempsey*, 27 Mich. 363; *Beazley v. Denson*, 40 Tex. 416; *Evans v. Arnold*, 52 Ga. 169; *Tingley v. Cogwill*, 48 Mo. 291; *McMechen v. McMechen*, 17 W. Va. 683; 41 Am. Rep. 682; *Layman's Will*, 40 Minn. 371; *Appeal of Livingstone*, 63 Conn. 68; the same is true on appeal from probate court, *Seebrook v. Fedawa*, 30 Neb. 424. See note, 17 L. R. A. 494; and articles, 3 Cent. L. Jour. 225; 18 *id.* 282; 36 *id.* 408. For the rule where fiduciary relations exist, see sec. 189 *infra*.

2, *Whitenack v. Stryker*, 2 N. J. Eq. 8; *Lee's Will*, 46 N. J. Eq. 193; *Duffield v. Robeson*, 2 Har. (Del.) 375; *Grubbs v. McDonald*, 91 Pa. St. 236; *Allen v. Griffin*, 69 Wis. 529; *Taylor v. Cresswell*, 45 Md. 422; *Rush v. Magee*, 36 Ind. 69; *Chrisman v. Chrisman*, 16 Ore. 127; *Eastis v. Montgomery*, 93 Ala. 293; *Ford v. Ford*, 7 Hump. (Tenn.) 92; *Will of Coffman*, 12 Iowa 491; *McDaniel v. Crosby*, 19 Ark. 533; *Burton v. Scott*, 3 Rand. (Va.) 399; *Stephenson v. Stephenson*, 62 Iowa 163; *Mullins v. Cottrell*, 41 Miss. 291; *Perkins v. Perkins*, 39 N. H. 163; *Will of Cole*, 49 Wis. 179; *Pendlay v. Eaton*, 130 Ill. 69; *Fee v. Taylor*, 83 Ky. 259; *McCoon v. Allen*, 45 N. J. Eq. 708.

3, *Pendlay v. Easton*, 130 Ill. 69; *Wilbur v. Wilbur*, 129 Ill. 392; *Will of Silverthorn*, 68 Wis. 372; *Will of Cole*, 49 Wis. 179; *Allen v. Griffin*, 69 Wis. 529.

4, *McGinness v. Kempsey*, 27 Mich. 363; *Taff v. Hosmer*, 14 Mich. 309; *Crowninshield v. Crowninshield*, 2 Gray 524.

5, *Evans v. Arnold*, 52 Ga. 169; *Beazley v. Denson*, 40 Tex. 425; *Williams v. Robinson*, 42 Vt. 658; 1 Am. Rep. 359.

6, *Layman's Will*, 40 Minn. 371; *Will of Silverthorn*, 68 Wis. 372; *Allen v. Griffin*, 69 Wis. 529.

7, *Crowninshield v. Crowninshield*, 2 Gray 524; *Delafield v. Parish*, 25 N. Y. 9; *Williams v. Robinson*, 42 Vt. 658; 1 Am. Rep. 359; *Knox's Appeal*, 26 Conn. 20; *Rees v. Stille*, 38 Pa. St. 138; *Barnes v. Barnes*, 66 Me. 286; *Irish v. Newell*, 62 Ill. 196; *Comstock v. Hadlyme Ecc. Soc.*, 8 Conn. 254; 20 Am. Dec. 100; *Tingley v. Cowgill*, 48 Mo. 291; *Renn v. Samos*, 33 Tex. 760; *Prentis v. Bates*, 93 Mich. 234; *Norton v. Paxton*, 110 Mo. 456; *Harrison v. Bishop*, 131 Ind. 161; *Seebrock v. Fedawa*, 30 Neb. 424.

8, *Hawkins v. Grimes*, 13 B. Mon. (Ky.) 257; *Fee v. Taylor*, 83 Ky. 259; *Clark v. Ellis*, 9 Ore. 128; *Perkins v. Perkins*, 39 N. H. 163; *Kempsey v. McGinness*, 21 Mich. 123; *Webber v. Sullivan*, 58 Iowa 260; *Will of Silverthorn*, 68 Wis. 372; *Graybeal v. Gardner*, 146 Ill. 337; *Grubbs v. McDonald*, 91 Pa. St. 236; *McCulloch v. Campbell*, 48 Ark. 367; *Mayo v. Jones*, 78 N. C. 402. See long note, 17 L. R. A. 494. See articles, 18 Cent. L. Jour. 282; 36 *id.* 408.

9, *McMechen v. McMechen*, 17 W. Va. 683; 41 Am. Rep. 682; *Webber v. Sullivan*, 58 Iowa 260; *Seebrock v. Fedawa*, 30 Neb. 424. See also, 3 Cent. L. Jour. 225.

§ 188. **Burden of proof as between persons in a fiduciary relation.**—There is a well recognized qualification of the general rule that the burden of proof is upon the party alleging a fraud. When a question arises between a trustee and a beneficiary or

between other parties who are in a fiduciary relation as to the good faith of transactions between them, a peculiar burden is imposed upon the one in whom the trust is reposed. When the complaining party proves such relation, the *burden of proof is cast upon the trustee* or other person holding the relation of trust to show that the transaction is fair and reasonable and that all proper information has been given to the other party. To state the rule more broadly, when confidential relations exist between two persons, resulting in one having an influence over the other, and a business transaction takes place between them, resulting in a benefit to the person holding the influential position, the law presumes everything against the transaction and casts the burden of proof upon the person benefited to show that the confidential relation has been, as to that transaction at least, suspended and that it was as fairly conducted as if between strangers.¹ This rule applies, for example, to agents,² attorneys,³ physicians,⁴ partners,⁵ trustees,⁶ guardians⁷ and to executors and administrators.⁸ A similar rule is applied in the dealings of a *parent with his child*, when the circumstances are such that undue influence may naturally be inferred,⁹ and to the dealings of a child with an old or infirm parent, when the circumstances are such that the former assumes a fiduciary relation.¹⁰ And generally when contracts are executed by per-

sons of very weak minds arising from age or sickness, intoxication or any other cause, although not amounting to absolute disqualification, undue influence by the person benefited by the transaction will be readily inferred; the burden of showing that the transaction is fair is placed upon the one so benefited.¹¹

1, *Atkins v. Withers*, 94 N. C. 581; *Jones v. Lloyd*, 117 Ill. 597; *Porter v. Woodruff*, 36 N. J. Eq. 174; *Cumberland, C. & I. Co. v. Parish*, 42 Md. 598; *Street v. Goss*, 62 Mo. 226; *Pironi v. Corrigan*, 47 N. J. Eq. 135.

2, *Gardner v. Ogden*, 22 N. Y. 327; 78 Am. Dec. 192.

3, *Pacific Ry. Co. v. Ketchum*, 101 U. S. 289; *Post v. Mason*, 91 N. Y. 539; 43 Am. Rep. 689; *Whitehead v. Kennedy*, 69 N. Y. 462; *Cowee v. Cornell*, 75 N. Y. 91; 31 Am. Rep. 428; *Holman v. Loynes*, 18 Jur. 839.

4, *Cadwaallader v. West*, 48 Mo. 483; *Woodbury v. Woodbury*, 141 Mass. 329; 55 Am. Rep. 479 and note.

5, *Maddeford v. Austrick*, 1 Sim. 89.

6, *Jones v. Lloyd*, 117 Ill. 597; *Porter v. Woodruff*, 36 N. J. Eq. 174.

7, *Meek v. Perry*, 36 Miss. 190; *Ashton v. Thompson*, 32 Minn. 25. See also article in 28 Cent. L. Jour. 476.

8, *Humphreys v. Burleson*, 72 Ala. 1; *Statham v. Ferguson*, 25 Gratt. (Va.) 28; *Warner v. Warner*, 18 App. Cas. (N. Y.) 151.

9, *Bradshaw v. Yates*, 67 Mo. 221; *Ashton v. Thompson*, 32 Minn. 25; *Miskey's Appeal*, 107 Pa. St. 611; *Miller v. Simonds*, 72 Mo. 669; *Wood v. Rabe*, 96 N. Y. 414.

10, *Martin v. Martin*, 1 Heisk. (Tenn.) 644; *Highberger v. Stiffler*, 21 Md. 338; *Simpler v. Lord*, 28 Ga. 52; *Jacox v. Jacox*, 40 Mich. 473; *Thorn v. Thorn*, 51 Mich. 167; *Day v. Day*, 84 N. C. 408; *Smith v. Loafman*, 145 Pa. St. 628; *Glover v. Hayden*, 4 Cush. 580; *Harrington v. Grant*, 54 Vt. 236; *Deem v. Phillips*, 5 W. Va. 168.

11, *Moore v. Moore*, 56 Cal. 89; *Allore v. Jewell*, 94 U. S. 506; *Fishburn v. Ferguson*, 84 Va. 87; *Hale v. Brown*, 11 Ala. 87; *Samuel v. Marshall*, 3 Leigh (Va.) 567. For general discussion, see long note, 21 Am. St. Rep. 94.

§ 189. **Same—In respect to wills.**—On a somewhat analogous principle it has been held that, when the draughtsman of a will is a stranger to the blood of the testator and there is a provision in the will giving him a considerable legacy, there is the presumption that the testator does not know the contents of the will, and that the burden is upon the proponent to rebut this presumption.¹ But the mere fact that the *writer of a will is a beneficiary* under it does not defeat the will; and it may well be doubted whether such fact changes the burden of proof. The burden of proving capacity and the fact of execution are upon the proponent; and from these facts the knowledge and assent of the testator are generally implied.² Probably by the weight of authority there is no presumption of fraud or undue influence from the mere fact that the will contains provisions beneficial to the scrivener, although he is the attorney,³ spiritual adviser⁴ or other person who holds some confidential or fiduciary relation with the testator; and in such cases it is incumbent upon the person attacking the will to give some evidence tending to show fraud or undue influence.⁵ But when the *draughtsman of a will* provides for a *legacy for himself*, it is a sus-

picious circumstance of more or less weight according to the degree of relationship, the amount of the legacy and all the other circumstances of the case.⁶ It is a circumstance which calls for the scrutiny of the court and which may have great weight on the question of undue influence, or in leading to the conclusion that the testator did not know the real nature of the instrument.⁷ The same rule obtains although the will is not written by the beneficiary, if he procures it to be drawn and dictates its contents. *Qui facit per alium, facit per se.*⁸ Although in the class of cases under consideration stronger proof of the knowledge of the contents of a will on the part of the testator may be required, such evidence may be circumstantial in its nature.⁹ The courts have *presumed* that *undue influence* had been used and have thrown upon the legatees or devisees the burden of rebutting the presumption in numerous cases where the beneficiaries were in a situation to take advantage of a confidential relation sustained toward the testator, as where the testator excluded the natural objects of his bounty and then made bequests to his attorney,¹⁰ to a spiritual adviser,¹¹ to a guardian¹² or to other persons in such confidential relations.¹³ But as a rule the burden of proof is *not changed by the fact that there are inequalities* or injustice in respect to some of the testator's children;¹⁴ nor by reason of feelings

of resentment which the testator may have entertained.¹⁵ There is no presumption of undue influence affecting the burden of proof arising from the fact that bequests are made by a *husband* to his *wife* or by a wife to her husband, even though such bequests may have been to some extent the result of persuasion and importunity,¹⁶ or the result of influence acquired over the testator by means of kind treatment and intimate intercourse;¹⁷ nor is there any such presumption from the fact that a husband changed his will to gratify his wife,¹⁸ or that he revoked a former will without any known reason.¹⁹ No presumption of undue influence arises from the fact that a bequest is made by the testator to one with whom he is living in *illicit intercourse*.²⁰ While any one of these facts standing alone is not enough to raise a presumption of undue influence and to change the general burden of proof, yet *such circumstances are to be considered* in connection with other facts; and when taken in connection with facts tending to show improper influence, they may have great weight.

1, *Hughes v. Meredith*, 24 Ga. 325; 71 Am. Dec. 127; *Tompkins v. Tompkins*, 1 Bailey (S. C.) 92; 19 Am. Dec. 656. See long note, 21 Am. St. Rep. 94. As to burden of proof as to testamentary capacity, see sec. 187 *supra*.

2, *Barry v. Butlin*, 1 Curt. Ecc. 637; *Post v. Mason*, 91 N. Y. 539; 43 Am. Rep. 689.

3, *Post v. Mason*, 91 N. Y. 539; 43 Am. Rep. 689; *Rusling v. Rusling*, 36 N. J. Eq. 603; *Carter v. Dixon*, 69 Ga.

82; *Montague v. Allan*, 78 Va. 592; 49 Am. Rep. 384. This is especially true where an attorney and confidential friend was appointed executor, but was not named as legatee, *Appeal of Livingston*, 63 Conn. 68. Contra, *Yardley v. Cuthbertson*, 108 Pa. St. 395; 56 Am. Rep. 218. See also, *Delafield v. Parish*, 25 N. Y. 9; *Richmond's Appeal*, 59 Conn. 226; 21 Am. St. Rep. 85 and note.

4, *Kerrigan v. Lernard*, (N. J.) 8 At. Rep. 503.

5, *Montague v. Allan*, 78 Va. 592; 49 Am. Rep. 384; *Carter v. Dixon*, 69 Ga. 82; *Rusling v. Rusling*, 36 N. J. Eq. 603; *Horah v. Knox*, 87 N. C. 483; *Critz v. Peerce*, 106 Ill. 167.

6, *Beall v. Mann*, 5 Ga. 456; *Rusling v. Rusling*, 36 N. J. Eq. 603; *Hughes v. Meredith*, 24 Ga. 325; 71 Am. Dec. 127.

7, See cases last cited and also cases cited in note, 71 Am. Dec. 129-134.

8, *Delafield v. Parish*, 25 N. Y. 9.

9, *Raworth v. Marriott*, 1 Mylne & K. 643; *Nexsen v. Nexsen*, 3 Abb. Dec. (N. Y.) 360.

10, *Post v. Mason*, 91 N. Y. 539; 43 Am. Rep. 689; *Yardley v. Cuthbertson*, 108 Pa. St. 395; 56 Am. Rep. 218; *Richmond's Appeal*, 59 Conn. 226; 21 Am. St. Rep. 85 and long note. See also, *Riddell v. Johnson's Ex.*, 26 Gratt. (Va.) 152.

11, *Marx v. McGlynn*, 88 N. Y. 357; *Schofield v. Walker*, 58 Mich. 96; *Thompson v. Hawks*, 14 Fed. Rep. 902, where the bequest was to a spiritual adviser.

12, *Breed v. Pratt*, 18 Pick. 115; *Meek v. Perry*, 36 Miss. 190; *Garvin v. Williams*, 44 Mo. 465; 100 Am. Dec. 314 and note; *Budwell v. Swank*, 84 Mo. 455.

13, *Gay v. Gillilan*, 92 Mo. 250; 91 Am. St. Rep. 712; *Greenwood v. Cline*, 7 Ore. 18, where under peculiar circumstances children received the whole inheritance to the exclusion of others; *Byard v. Conover*, 39 N. J. Eq. 224, where the bequest was to a housekeeper.

14, *Turnure v. Turnure*, 35 N. J. Eq. 437; *Kise v. Heath*, 33 N. J. Eq. 239; *Bundy v. McKnight*, 48 Ind. 503.

15, *Dale v. Dale*, 36 N. J. Eq. 269.

16, *Will of Nelson*, 39 Minn. 204; *Armstrong v. Armstrong*, 63 Wis. 162.

17, *Will of Gluspin*, 26 N. J. Eq. 523; *Kise v. Heath*, 33 N. J. Eq. 239; *Will of Jackman*, 26 Wis. 104.

18, *Rankin v. Rankin*, 61 Mo. 295.

19, *Will of Nelson*, 39 Minn. 204.

20, *Dickie v. Carter*, 42 Ill. 376; *Wainright's Appeal*, 89 Pa. St. 220; *Porschet v. Porschet*, 82 Ky. 93; 56 Am. Rep. 880; *Monroe v. Barkley*, 17 Ohio St. 302; 93 Am. Dec. 620; *Main v. Ryder*, 84 Pa. St. 217; *Will of Donelly*, 68 Iowa 126, where the wife was testatrix.

§ 190. Burden as to crimes—Fraud.—

On the general principle that the burden of proof is upon the actor, the one asserting a fact, he who alleges that another has committed a crime or wrongful act assumes the *onus probandi* in respect to such issue. But there is an additional reason for the application of the principle in such cases, which is that innocence and right conduct are to be presumed rather than delinquency or crime—

Odiosa et inhonesta non sunt in lege præsumenda. It is beyond the scope of this work to discuss the principle in its application to the *criminal law*. It suffices to call attention to the familiar rule that in criminal procedure the state has not only the burden of proving its claim by a preponderance of evidence, but beyond a reasonable doubt. In other words, if after the comparison and consideration of all the evidence the minds

of the jurors are in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge, the prosecution fails.¹ On its *civil* side the law furnishes abundant illustrations that the burden of proof is upon the one who asserts that a wrong has been committed. As we have already seen, it is a familiar principle that the burden of proof is on him who complains of *negligence*. "He must not only show that he suffered harm in such a manner that it might be caused by the defendant's negligence, he must show that it was so caused; and to do this he must prove facts inconsistent with due diligence on the part of the defendant."² The principle is equally familiar in the law of *fraud*. Thus, while it is error to charge the jury that fraud must be proved "beyond reasonable doubt" by the party alleging it,³ or by "clear and undoubted proof"⁴ or by "irresistible" evidence, still parties are presumed to be free from fraud until the contrary is proved, and the burden rests upon him who asserts fraudulent conduct to make good the charge by *clear and satisfactory proofs*.⁵ Thus the burden is upon the party, plaintiff or defendant, who asserts that a contract⁶ or conveyance was obtained by fraudulent representations;⁷ or that a will was obtained by fraud or undue influence;⁸ or that property has been conveyed in fraud of creditors,⁹ or when false

representations of any kind are alleged as a defense.¹⁰ Although the evidence of fraud must be satisfactory and convincing, it need not be direct in character, but may consist of *circumstantial* or presumptive evidence from which the fraud may be inferred.¹¹

1, Com. v. Webster, 5 Cush. 320; 52 Am. Dec. 711.

2, Pollock Torts p. 360; Cooley Torts p. 809. For qualification of the rule where facts are peculiarly within the knowledge of the party, see sec. 179 *supra*, and also sec. 181 *supra*, as to negligence cases.

3, *Ætna Ins. Co. v. Johnson*, 11 Bush (Ky.) 587; 21 Am. Rep. 223; *Kane v. Hibernia Ins. Co.*, 39 N. J. L. 697; 23 Am. Rep. 239; *Lee v. Pearce*, 68 N. C. 76; *Sparks v. Dawson*, 47 Tex. 138; *Washington Ins. Co. v. Wilson*, 7 Wis. 169; *Blaeser v. Milwaukee M. M. I. Co.*, 37 Wis. 31; 19 Am. Rep. 747.

4, *Abbey v. Dewey*, 25 Pa. St. 413.

5, *Carter v. Gunnels*, 67 Ill. 270; *Turner v. Younker*, 76 Iowa 258; *Marsh v. Cramer*, 16 Col. 331; *Louisville Ry. Co. v. Thompson*, 107 Ind. 442.

6, *Bank v. Lampriere*, 4 P. C. 572; 5 Moak Rep. 137; *Hill v. Reifsnider*, 46 Md. 555; *Tompkins v. Nichols*, 53 Ala. 197; *Bowden v. Bowden*, 75 Ill. 143; *Wallace v. Matlice*, 118 Ind. 59; *Nichols v. Patton*, 18 Me. 231; 36 Am. Dec. 713; *Beatty v. Fishel*, 100 Mass. 448; *Smith v. Ogilvie*, 127 N. Y. 143.

7, *Wellborn v. Tiller*, 10 Ala. 305.

8, *Baldwin v. Parker*, 99 Mass. 79; 96 Am. Dec. 697.

9, *Nichols v. Patton*, 18 Me. 231; 36 Am. Dec. 713.

10, *Campbell v. New England Ins. Co.*, 98 Mass. 381; *Briggs v. Humphrey*, 5 Allen 314.

11, *Rea v. Missouri*, 17 Wall. 532; *Kaine v. Weighley*, 22 Pa. St. 179; *Reed v. Noxon*, 48 Ill. 323; *Lowry v. Beckner*, 5 B. Mon. (Ky.) 43; *Burch v. Smith*, 15 Tex. 219; 65 Am. Dec. 154; *Marsh v. Cramer*, 16 Col. 331.

§ 191. **Burden in quo warranto proceedings.**—Attention should be called to the fact that the ordinary rules as to the burden of proof do not apply in *quo warranto* proceedings. One who is exercising the privileges of a public office is considered an usurper unless he can maintain his title; and in a proceeding by the public, the *burden* of showing his right to the office is cast upon the *respondent*.¹ If the defendant is unable to show good title to the office the people are entitled to a judgment of ouster.² It is no defense to the incumbent that a relator who seeks to assert his right may fail to establish such claim; judgment of amotion may nevertheless be rendered;³ but where the proceeding is on the relation of a *person claiming title*, he has the burden of proof to establish his claim.⁴ In *quo warranto* proceedings undertaken by the people the burden is so far cast upon the respondent that he cannot rely upon presumptions, but he must prove the continued existence of every qualification necessary to the enjoyment of the office.⁵ Although the proper official certificate is *prima facie* evidence of election to an office,⁶ it is a familiar rule that the *certificate* and *returns* on which it is based are *open to investigation* and that judgment will be rendered according to the real facts.⁷

1, Rex v. Leigh, 4 Burr. 2143; State *ex rel.* Swenson v. Norton, 46 Wis. 332; People v. Mayworm, 5 Mich. 146; People v. Thacher, 55 N. Y. 525; 14 Am. Rep. 312; People v. Niles, 2 Mich. 348; 2 Dill. Mun. Corp. sec. 893; High

Ex. L. Rem. sec. 629. Contra, *People v. Lacoste*, 37 N. Y. 192; *State v. Hunton*, 28 Vt. 594.

2, *People v. Ridgley*, 21 Ill. 67; *People v. Utica Ins. Co.*, 15 Johns. 353; 8 Am. Dec. 243; *State v. Harris*, 3 Ark. 570; 36 Am. Dec. 460, and cases cited above.

3, *State ex rel. Swenson v. Norton*, 46 Wis. 332; *Clark v. People*, 15 Ill. 217. Nor does a failure of defendant prove the title of relator to the office, *People v. Thacher*, 55 N. Y. 525; 14 Am. Rep. 312.

4, *People v. Thacher*, 55 N. Y. 525; 14 Am. Rep. 312; *People v. Lacoste*, 37 N. Y. 192; *Miller v. English*, 21 N. J. L. 317; *People v. Nostrand*, 46 N. Y. 375.

5, *State v. Beecher*, 15 Ohio 723; *People v. Mayworm*, 5 Mich. 148; High Ex. L. Rem. sec. 629.

6, *State ex rel. Swenson v. Norton*, 46 Wis. 332; *People v. Thacher*, 55 N. Y. 525; 14 Am. Rep. 312.

7, *People v. Thacher*, 55 N. Y. 525; 14 Am. Rep. 312; *People v. Lacoste*, 37 N. Y. 192; *State ex rel. Swenson v. Norton*, 46 Wis. 332.

§ 192. Burden as to statutes of limitation.—Cases arising under statutes of limitation have presented an apparent exception to the general rules. It was held in numerous early cases that when an issue is raised as to the statute, the burden of proof is upon the plaintiff to show that the action accrued within the statutory period.¹ On the other hand it has been held, and with much force, that since the plea of the statute of limitations is an *affirmative defense*, the burden should rest upon the defendant to prove the facts which entitle him to its benefit.² It is clear that one who claims the benefit of any *exception to the statute* must prove the facts

upon which he relies; and if on the plaintiff's own showing the statute stands in the way, he must prove such facts as are necessary to take the case out of the operation of the statute.³

1, Taylor v. Spears, 1 Eng. (Ark.) 381; 44 Am. Dec. 519; Pond v. Gibson, 5 Allen 19; 81 Am. Dec. 724 and note; Hurst v. Parker, 2 Chit. 249; Slocum v. Riley, 145 Mass. 370; Robinson v. State, 20 Fla. 804; Hussey v. Kirkman, 95 N. C. 63; Moore v. Garner, 101 N. C. 374; Apperson v. Pattison, 11 Lea (Tenn.) 484; Stansbury v. Stansbury, 20 W. Va. 23.

2, Wise v. Williams, 72 Cal. 544; Campbell v. Laclede Gas Co., 84 Mo. 352; Lewis v. Mason, 84 Va. 731; Duggan v. Cole, 2 Tex. 381; Combs v. Smith, 78 Mo. 32. See note, 81 Am. Dec. 725.

3, Davenport v. Wynne, 6 Ired. (N. C.) 128; 44 Am. Dec. 70; Cook v. Cook, 10 Heisk. (Tenn.) 466; Apperson v. Pattison, 11 Lea (Tenn.) 484; Yell v. Lane, 41 Ark. 53; Vail v. Halton, 14 Ind. 344; Dessaunier v. Murphy, 33 Mo. 184, that one was a *feme covert*; Phillips v. Holman, 26 Tex. 276, absence from the state; Knight v. Clements, 45 Ala. 89; 6 Am. Rep. 693, part payment; Moore v. Leseur, 18 Ala. 606, new promise; Spuryer v. Hardy, 4 Mo. App. 573, fraudulent concealment.

§ 193. Burden and weight of proof where crime is in issue in civil cases.—By the English rule "if the commission of a crime is directly in issue in any proceeding, criminal or civil, it must be proved beyond a reasonable doubt."¹ In the earlier authorities the same rule was sometimes declared in this country, and it has been preferred in a limited number of states more recently.² But undoubtedly the prevailing rule in this coun-

try is that, in civil actions, it is sufficient to prove the issue whether civil or criminal by a *preponderance of testimony*.³ In several states in which the earlier decisions leaned toward the English rule the courts have since adopted the American rule on this subject. The following quotation from a decision of the supreme court of Maine indicates the reason for the old rule and the reason of its abandonment: "We think it time to limit the application of a rule, which was originally adopted in *favorem vitae* in the days of a sanguinary penal code, to cases arising on the criminal docket, and no longer to suffer it to obstruct or incumber the action of juries in civil suits sounding only in damages."⁴ Accordingly by the great weight of authority in the United States it is sufficient in a civil case to prove by a preponderance of evidence the charge of false representations,⁵ the wilful burning of property in insurance cases,⁶ the charge of bastardy⁷ or in an action to recover stolen property, that the money found in defendant's possession belonged to the plaintiff.⁸ The same rule prevails in actions for slander and libel, where the defendant seeks to prove his justification in charging that a criminal offense has been committed,⁹ and in actions for divorce on the ground of adultery.¹⁰ Although there has been somewhat more diversity of opinion in respect to the two issues last named, no principle can be suggested on which any valid

distinction can be based. In a few courts it has been held that a criminal offense *charged in the pleadings* in a civil case must be proved beyond a reasonable doubt, but that the same rule does not apply where the charge comes only *incidentally* in issue.¹¹ But it will be found that, while in many of the cases already cited to support the general rule, the charge was directly in issue by the pleadings, no such distinction was recognized; and it seems plain that on principle no distinction exists. But where the issue involves a charge of moral turpitude, the *presumption of innocence* obtains in civil as well as in criminal cases; hence when in a civil action a party is charged with a crime, the evidence should be sufficient to overcome the presumption of innocence; and for this purpose more evidence may be necessary than in ordinary cases.¹²

1, Steph. Ev. art. 94; Thurtell v. Beaumont, 1 Bing. 339; 8 Moore 612; Willmet v. Harmer, 8 Car. & P. 695; Cliffters v. Shackell, 6 Car. & P. 475; Tayl. Ev. sec. 112.

2, Corbley v. Wilson, 71 Ill. 209; 22 Am. Rep. 98; Merk v. Gelzhaeuser, 50 Cal. 631; Tucker v. Call, 45 Ind. 31; Polston v. See, 54 Mo. 291; Williams v. Gunnels, 66 Ga. 521; Steinman v. McWilliams, 6 Barr (Pa.) 170; Lanter v. McEwen, 8 Blackl. (Ind.) 495; Coulter v. Stuart, 2 Yerg. (Tenn.) 225; Shultz v. Pacific Ins. Co., 14 Fla. 73. See also, Sprague v. Dodge, 48 Ill. 142; 95 Am. Dec. 523 and extended note.

3, Bell v. McGinness, 40 Ohio St. 204; 48 Am. Rep. 673; Ellis v. Buzzell, 60 Me. 209; 11 Am. Rep. 204; Folsom v. Brown, 25 N. H. 114; People v. Evening News, 51 Mich.

11; *Blaeser v. Milwaukee Ins. Co.*, 37 Wis. 31; 19 Am. Rep. 747; *Kane v. Hibernia Ins. Co.*, 39 N. J. L. 697; 23 Am. Rep. 239; *Rothschild v. Amer. Ins. Co.*, 62 Mo. 356; *Behrens v. Germania Ins. Co.*, 58 Iowa 26; *Seybolt v. New York Ry. Co.*, 95 N. Y. 562; 47 Am. Rep. 75; *Heiligmann v. Rose*, 81 Tex. 222; 26 Am. St. Rep. 804 and note; *Schmidt v. N. Y. Ins. Co.*, 1 Gray 529; *Roberge v. Burnham*, 124 Mass. 277; *Thoreson v. Northwestern Ins. Co.*, 29 Minn. 107; *Weston v. Gravlin*, 49 Vt. 507; *Munson v. Atwood*, 30 Conn. 102.

4, *Ellis v. Buzzell*, 60 Me. 209; 11 Am. Rep. 204; *Adams v. Thornton*, 78 Ala. 489; 56 Am. Rep. 49; *Kane v. Hibernia Ins. Co.*, 39 N. J. L. 697; 23 Am. Rep. 239.

5, *Munson v. Atwood*, 30 Conn. 102; *Coit v. Churchill*, 61 Iowa 296; *Gordon v. Parmelee*, 15 Gray 413; *Hough v. Dickinson*, 58 Mich. 89; *Thoreson v. Northwestern Ins. Co.*, 29 Minn. 107; *Jones v. Greaves*, 26 Ohio St. 2; 20 Am. Rep. 752.

6, *Continental Ins. Co. v. Jachnichen*, 110 Ind. 59; 59 Am. Rep. 194; *Behrens v. Germania Ins. Co.*, 58 Iowa 26; *Ætna Ins. Co. v. Johnson*, 11 Bush (Ky.) 587; 21 Am. Rep. 223; *Wightman v. Western Ins. Co.*, 8 Rob. (La.) 442; *Decker v. Somerset Ins. Co.*, 66 Me. 406; *Schmidt v. N. Y. V. M. F. I. Co.*, 1 Gray 529; *Rothschild v. Am. Ins. Co.*, 62 Mo. 356; *Kane v. Hibernia Ins. Co.*, 39 N. J. L. 697; 23 Am. Rep. 239; *Blaeser v. Milwaukee M. M. I. Co.*, 37 Wis. 31; 19 Am. Rep. 747. Contra, *Germania Ins. Co. v. Klewer*, 129 Ill. 599; *McConnell v. Delaware Co.*, 18 Ill. 228; *Barton v. Thompson*, 46 Iowa 30; 26 Am. Rep. 131; *Shultz v. Pacific Ins. Co.*, 14 Fla. 73.

7, *Mann v. People*, 35 Ill. 467; *People v. Christman*, 66 Ill. 162; *Knowles v. Scribner*, 57 Me. 495; *Young v. Makepeace*, 103 Mass. 50; *Semon v. People*, 42 Mich. 141; *State v. Nichols*, 29 Minn. 357.

8, *United States Express Co. v. Jenkins*, 73 Wis. 471.

9, *Riley v. Norton*, 65 Iowa 306; *Sloan v. Gilbert*, 12 Bush (Ky.) 51; 23 Am. Rep. 708; *Ellis v. Buzzell*, 60 Me. 209; 11 Am. Rep. 204; *Folsom v. Brown*, 25 N. H. 114; *Kincade v. Bradshaw*, 3 Hawks (N. C.) 63; *McBee v. Ful-*

ton, 47 Md. 403; 28 Am. Rep. 465. Contra, Tucker v. Call, 45 Ind. 31; Tolston v. See, 54 Mo. 291; Corbley v. Wilson, 71 Ill. 209; 22 Am. Rep. 98; Merk v. Gelzhaeuser, 50 Cal. 631; Williams v. Gunnels, 66 Ga. 521.

10, Poertner v. Poertner, 66 Wis. 644; Allen v. Allen, 101 N. Y. 658; Chestnut v. Chestnut, 88 Ill. 548; Smith v. Smith, 5 Ore. 186. Contra, Berckmans v. Berckmans, 17 N. J. Eq. 453.

11, Hahnemannian Ins. Co. v. Beebe, 48 Ill. 87; 95 Am. Dec. 519; Schmidt v. New York Ins. Co., 1 Gray 529. See also, Kane v. Hibernia Ins. Co., 38 N. J. L. 441; 20 Am. Rep. 409; 39 N. J. L. 697; 23 Am. Rep. 239.

12, Decker v. Somerset Ins. Co., 66 Me. 406; Jones v. Greaves, 26 Ohio St. 2; 20 Am. Rep. 752; Hills v. Goodyear, 4 Lea (Tenn.) 233; 40 Am. Rep. 5; Bradish v. Bliss, 35 Vt. 326. See extended note, 95 Am. Dec. 528.

§ 194. **Statutes as to burden of proof.** Statutes exist in some jurisdictions changing the general rule as to the burden of proof. For example, in England many statutes have been enacted which in certain criminal proceedings place upon the defendant the burden of explaining the possession of counterfeit money or tools or implements used in house-breaking. And in respect to many other offences statutes in a similar manner both in England and in this country regulate the burden of proof as to certain facts peculiarly within the knowledge of the defendant. Owing to the difficulty of obtaining direct evidence of violations of statutes with respect to *gambling* and similar offences, statutes in some jurisdictions have declared that if any of the implements or devices commonly used by

gamblers in gambling houses are found in any house, it shall be *prima facie* evidence that such house is kept for gambling purposes.¹ Similar statutes have been enacted making the possession or delivery of *intoxicating liquors* under certain conditions *prima facie* evidence of their unlawful sale.² Although the *constitutionality of legislation* of this character has been attacked, the clear weight of authority sustains the view that it is competent for the legislature to prescribe rules of evidence both in civil and criminal cases and to regulate the burden of proof by statute. In criminal cases the limitation has been imposed that the acts declared *prima facie* evidence of the crime must have some relation to the criminal act and tend to prove the crime, and that the accused must have an opportunity to rebut the presumption created by the statute.³ Even *conclusive presumptions* regulating the burden of proof have been created by statutes and upheld by the courts in respect to *tax proceedings*, and it has been held that the legislature may make a tax deed conclusive evidence of the regularity of the prior proceedings as to all non-essentials or as to matters of routine which rest in mere expediency, acts which need not have been required by the statute in the first place and which the legislature may, by a curative act, excuse when omitted.⁴ The cases sustaining this view, however, imply that it

would not be competent for the legislature, by prescribing rules of evidence, to deprive parties of their *vested rights*.⁵ Statutes quite generally exist creating a presumption of *fraud* as against creditors in the *sale of goods* in possession, unless accompanied by immediate delivery, and placing the burden of proving good faith upon the person claiming under such sale; other statutes place the burden of showing good faith upon the holders of *chattel mortgages* in contests between such mortgagees and the creditors of the debtor. For other statutes on the subject of which these are only illustrations the practitioner should consult the statutes of his jurisdiction.

1, *Wooton v. State*, 24 Fla. 335; *Morgan v. State*, 117 Ind. 569. As to the general subject of this section, see extended note, 36 Am. St. Rep. 682-689.

2, *Com. v. Rowe*, 14 Gray 47; *Board of Com. v. Merchant*, 103 N. Y. 143; 57 Am. Rep. 705; *Edwards v. State*, 121 Ind. 450; *State v. Morgan*, 40 Conn. 44; *Lincoln v. Smith*, 27 Vt. 328; *State v. Cunningham*, 25 Conn. 195; *State v. Hurley*, 54 Me. 562; *State v. Mellor*, 13 R. I. 666.

3, *Com v. Wallace*, 7 Gray 222, and cases cited above in this section.

4, *Phelps v. Meade*, 41 Iowa 470; *De Treville v. Smalls*, 98 U. S. 517; *Ensign v. Barse*, 107 N. Y. 329; *Matter of Orloff Lake*, 40 La. An. 142; *Rollins v. Wright*, 93 Cal. 397. But some cases hold that such tax deed can be conclusive only as to minor matters of irregularity, but not as to essentials, *Marx v. Hanthorn*, 30 Fed. Rep. 579; *Abbott v. Lindenbower*, 42 Mo. 162.

5, *State v. Beswick*, 13 R. I. 211; 43 Am. Rep. 26; *Little Rock & Ft. Scott Ry. Co. v. Payne*, 33 Ark. 816.

§ 195. The right to begin and reply.—

Closely connected with the subject of burden of proof is the very practical question as to who has the right to begin the introduction of evidence, and the right to open and reply in the argument to the court or jury. This is for the determination of the court on inspection of the pleadings.¹ The rule which has come to prevail is that "the plaintiff should bring his own cause of complaint before the court and jury in every case where he has anything to prove, either as to the facts necessary for his obtaining a verdict or as to the amount of damages to which he conceives the proof of such facts may entitle him."² The defendant who may wish to take the right of opening and concluding the trial must so frame his pleading as to present no issue upon any allegation of the complaint essential to the plaintiff's alleged cause of action. If the defendant fail to do that, no matter how little proof the remaining issues require or how easily or in what manner it may be established by evidence, the right of the plaintiff to open and close is not denied him. The *test* is whether the plaintiff, upon the pleadings without any proof, is entitled to recover upon all the causes of action alleged in his complaint. If he is so entitled to recover and if the defendant alleges any counterclaim, controverted by the plaintiff's pleading, or any affirmative matter of defense

in avoidance of the plaintiff's alleged cause of action which is the subject of trial, the defendant has the right to open and close, otherwise not.³ Accordingly in all actions where the *damages are unliquidated* and the amount is not admitted, whether in tort⁴ or contract,⁵ the plaintiff opens the proof and has the right to open and close the argument. But in those actions where the pleadings are so framed that the allegations of the complaint are admitted and the answer consists of a substantive defense, and where the damages are liquidated, the *defendant takes the initiative* and has the opening and the close in introducing evidence as well as in the argument.⁶ Common illustrations of this rule are found in actions on notes, bank checks, policies of insurance and other agreements, where the amount to be recovered can be ascertained by mere computation,⁷ and where the defendant sets up an affirmative defense or counterclaim.⁸ It is obvious that when the answer consists of a general denial⁹ or of specific allegations constituting a denial, the burden is upon the plaintiff and he has the right to open and close;¹⁰ and even where the plaintiff waives the opening argument, he is still entitled to the close, if the defendant makes an argument.¹¹

1, *Dahlman v. Hammel*, 45 Wis. 466; *Richards v. Nixon*, 20 Pa. St. 19. The admission of facts at the opening of the trial by the defendant does not change the rule, *Lake Ontario Bank v. Judson*, 122 N. Y. 278.

2, Lord Denman in *Mercer v. Whall*, 5 Q. B. 447; 5 Adol. & Ell. N. S. 447; *Fry v. Bennett*, 28 N. Y. 324, libel; *Lake Ontario Bank v. Judson*, 122 N. Y. 638; *Dorr v. Tremont Nat. Bank*, 128 Mass. 349; *Cunningham v. Gallagher*, 61 Wis. 170, slander; *Rolfe v. Pollond*, 16 Neb. 21; *Bates v. Forcht*, 89 Mo. 121, execution of a note; *Robinson v. Hitchcock*, 8 Met. 64; *Mizer v. Bristol*, 30 Neb. 138; *Perkins v. Ermel*, 2 Kan. 325; *Rahm v. Deig*, 121 Ind. 283; *Pierce v. Lyman*, 28 Ark. 550; *Johnson v. Josephs*, 75 Me. 544; *Love v. Dickerson*, 85 N. C. 5; *Dille v. Lovell*, 37 Ohio St. 415, assault, plea of justification; *Young v. Highland*, 9 Gratt. (Va.) 16, assault and battery, plea of justification; *Graham v. Gautier*, 21 Tex. 112, action for physician's bill, counterclaim for want of skill; *Camp v. Brown*, 48 Ind. 575, where proof was necessary to show reasonable attorney fee in a note; *Wright v. Abbott*, 85 Ind. 154, action on account, cause of action denied, plea of payment; *Dahlman v. Hammel*, 45 Wis. 466, action on guaranty of notes, answer denying indebtedness and setting up fraud; *Buzzell v. Snell*, 25 N. H. 474, goods sold, plea general issue and tender. Contra, *Ransom v. Christian*, 56 Ga. 351, slander; *Moses v. Gatewood*, 5 Rich. L. (S. C.) 234, libel and slander; *Downey v. Day*, 4 Ind. 531, assault; *Goldsberry v. Stuteville*, 3 Bibb (Ky.) 345, assault; *McKenzie v. Milligan*, 1 Bay (S. C.) 248, assault; *Page v. Carter*, 8 B. Mon. (Ky.) 192. In Massachusetts the tendency of the decisions is to allow the plaintiff to open and close in all cases, *Dorr v. Tremont Bank*, 128 Mass. 349.

3, *Lake Ontario National Bank v. Judson*, 122 N. Y. 278, 638; *Mercer v. Whall*, 5 Adol. & Ell. N. S. 447.

4, *Cunningham v. Gallagher*, 61 Wis. 170; *Vifquain v. Finch*, 15 Neb. 505; *Burckhalter v. Coward*, 16 S. C. 435; *Fry v. Bennett*, 28 N. Y. 324; *St. Louis Ry. Co. v. Taylor*, 57 Ark 136. Cases in slander and libel, *Young v. Highland*, 9 Gratt. (Va.) 16; *Johnson v. Josephs*, 75 Me. 544; *Shulse v. McWilliams*, 104 Ind. 512. Contra, *Louisville Journal v. Weaver*, (Ky.) 17 S. W. Rep. 1018. Assault, *Lunt v. Wormell*, 19 Me. 100. Trespass, *Ayer v. Austin*, 6 Pick. 225. Contra, *Cheeseman v. Hart*, 42 Fed. Rep. 98.

5, *Mercer v. Whall*, 5 Q. B. 447; 5 Adol. & Ell. N. S. 447, action for dismissing a servant; *Graham v. Gautier*, 21 Tex.

111, action for pay for physician's services; *Camp v. Brown*, 48 Ind. 575, action on notes providing for reasonable attorney's fees. But the admission of the cause of action, except as to questions of value, does not give defendant this right, *Sanders v. Bridges*, 67 Tex. 93.

6, *Donahoe v. Rich*, 2 Ind. App. 540, action for rent and attorney's fees under a lease; *Fiss v. Warren*, 26 N. Y. S. 75, action on a note, the defendant, by claiming and being allowed the affirmative, assumes the burden of proof, and the same is held on the reverse state of facts in *Burgess v. Burgess*, (Neb.) 62 N. W. Rep. 242, where, without objection, one party assumes the burden of proof, he also has the right to open and close to the jury.

7, Notes and bills, *Warner v. Haines*, 6 Car. & P. 666; *List v. Kortepeter*, 26 Ind. 27; *Harvey v. Ellithorpe*, 26 Ill. 418; *Tipton v. Triplett*, 1 Met. (Ky.) 570; *Hudson v. Weatherington*, 79 N. C. 3; *Blackledge v. Pine*, 28 Ind. 466; *Fairbanks v. Irvin*, 15 Col. 366; *Montgomery v. Hunt*, 93 Ga. 438; insurance policies, *Viele v. Germania Ins. Co.*, 26 Iowa 9; 96 Am. Dec. 83; *Young v. Newark Fire Ins. Co.*, 59 Conn. 41; *Murray v. New York Life Ins. Co.*, 85 N. Y. 236; check, *Elwell v. Chamberlin*, 31 N. Y. 611.

8, Usury, *Suiter v. Park Nat. Bank*, 35 Neb. 372; *Harvey v. Ellithorpe*, 26 Ill. 418; *Elwell v. Chamberlin*, 31 N. Y. 611; *Seekell v. Norman*, 78 Iowa 254; tender, *Auld v. Hepburn*, 1 Cranch. C. C. 122; discharge in bankruptcy or insolvency, *Richard v. Nixon*, 20 Pa. St. 19; failure of consideration of a note, *Towsey v. Shook*, 3 Blackf. (Ind.) 267; 25 Am. Dec. 108; want of jurisdiction, *Tipton v. Triplett*, 1 Met. (Ky.) 570; *List v. Kortepeter*, 26 Ind. 27; fraud or duress, *Elwell v. Chamberlin*, 31 N. Y. 611; *Hoxie v. Greene*, 37 How. Pr. (N. Y.) 97; want of consideration, *Crabtree v. Atchison*, 93 Ky. 156; action on judgment, plea of satisfaction, *Penson v. Packett*, 35 S. C. 178.

9, *Dahlman v. Hammel*, 45 Wis. 466; *Stayner v. Joyce*, 120 Ind. 99; *Leib v. Craddock*, 87 Ky. 525.

10, *Amos v. Hughes*, 1 Moody & R. 464; *Ayer v. Austin*, 6 Pick. 225; *Toppan v. Jenness*, 21 N. H. 232; *Robinson v. Hitchcock*, 8 Met. 64; *Cox v. Vickers*, 35 Ind. 27; Per-

kins v. Ermel, 2 Kan. 325; Judge v. Stone, 44 N. H. 593, Carpenter v. First Nat. Bank, 119 Ill. 352.

11, Trask v. People, 151 Ill. 523.

§ 196. **Same, continued.** — The rule is not changed by the fact that there are *admissions* in the answer of the facts alleged in the complaint, unless such admissions were such that the plaintiff is not required to introduce any evidence in the first instance to entitle him to judgment.¹ Where there are *several issues* as to one of which only the defendant has the affirmative, the plaintiff has both the opening and the closing, as "it is not usual to divide the issues and allow them to be argued piecemeal."² The right of the plaintiff to open and close is not necessarily defeated by the act of the defendant in setting up some special plea or defence. Such *special defence* may be in effect *a denial of the plaintiff's title* or of some of the allegations of the complaint, and not an admission.³ Thus, where the plaintiff's right of action depends upon proof of *bona fide* ownership, his right to open and close is not taken away by allegations in the answer that his title is fraudulent.⁴ It is held in some jurisdictions that the determination of this question by the court does not affect the merits of the case, and that an erroneous decision is not a ground for reversal in the appellate court, although it may be a ground for granting a

new trial by the trial judge.⁵ But the rule which more generally prevails is that the denial of a right to a party who is entitled to open and reply so far affects the merits as to afford *ground for reversal* on appeal when the question is presented by the bill of exceptions.⁶ In other states the question is deemed one of *judicial discretion*, and the decision of the trial judge will not be disturbed, except in cases of manifest abuse, where it appears that the complaining party has been injured by the erroneous ruling.⁷

1, Rahm v. Deig, 121 Ind. 283; Seymour v. Bailey, 76 Ga. 338.

2, Dixon C. J. in Central Bank v. St. John, 17 Wis. 166; Curtis v. Wheeler, 4 Car. & P. 196; 1 Moody & M. 493; Comstock v. Hadlyme, 8 Conn. 254; 20 Am. Dec. 100; Churchill v. Lee, 77 N. C. 341; Jackson v. Pittsford, 8 Blackf. (Ind.) 194; Bertrand v. Taylor, 32 Ark. 470; Bowen v. Spears, 20 Ind. 146; Viele v. Germania Ins. Co., 26 Iowa 9; 96 Am. Dec. 83; Montgomery v. Swindler, 32 Ohio St. 224; Buzzell v. Snell, 25 N. H. 474; Lake Ontario Bank v. Judson, 122 N. Y. 278; Johnson v. Maxwell, 87 N. C. 18.

3, Beatty v. Hatcher, 13 Ohio St. 115, answer admitted on assignment, but alleged to be fraudulent.

4, Churchill v. Lee, 77 N. C. 341.

5, Lancaster v. Collins, 115 U. S. 222; Day v. Woodworth, 13 How. 363; Cothran v. Forsyth, 68 Ga. 560; Reichard v. Manhattan Ins. Co., 31 Mo. 518; Aultman v. Falkum, 47 Minn. 414, by statute; Lexington Ins. Co. v. Paver, 16 Ohio 324; Hall v. Weare, 92 U. S. 728; Carpenter v. First Nat. Bank, 119 Ill. 352. See also, Montgomery v. Swindler, 32 Ohio St. 224.

6, Davis v. Mason, 4 Pick. 156; Merriam v. Cunningham, 11 Cush. 40; Royal Ins. Co. v. Swing, 87 Ky. 410; Millerd v. Thorn, 56 N. Y. 402; Porter v. Still, 63 Miss. 357; Ben-

ham v. Rowe, 2 Cal. 387; Johnson v. Maxwell, 87 N. C. 18; Blackledge v. Pine, 28 Ind. 466; Young v. Highland, 9 Gratt. (Va.) 16.

7, Kaime v. Trustees of Omro, 49 Wis. 371; Ney v. Rothe, 61 Tex. 374; Viele v. Germania Ins. Co., 26 Iowa 9; Gran v. Spangenberg, 53 Minn. 42; Farrell v. Brennan, 32 Mo. 328; State v. Waltham, 48 Mo. 55. For a full discussion of the whole subject see, Best Right to Begin and Reply; articles by Seymour D. Thompson, 25 Cent. L. Jour. 171, 459, 483; 2 Thomp. Trials sec. 225.

CHAPTER 7.

BEST EVIDENCE.

- § 197. Rule as to best evidence.
- § 193. Primary and secondary evidence.
- § 199. Illustrations of the rule — Public writings.
- § 200. Application of the rule — Private writings.
- § 201. The rule does not exclude evidence unless objection is made.
- § 202. Qualifications of the rule — Independent and collateral facts.
- § 203. Same, continued — Corporate acts.
- § 204. Appointment and acts of public officers -- Writings not producible, etc.
- § 205. Multiplicity of documents — General results.
- § 206. Parol proof of admissions concerning writings — English rule.
- § 207. Same — Rule in the United States.
- § 208. Same — Copies not the best evidence — Duplicates.
- § 209. The general rule as applied to telegrams — Mode of proof.
- § 210. Communications by telephone.
- § 211. Proof of lost instruments.
- § 212. Same — Diligence necessary before secondary evidence is allowed.
- § 213. Same — Further illustrations.
- § 214. Same — Cases illustrating what is sufficient.
- § 215. Importance of documents as affecting diligence — Time of search.
- § 216. Mode of proving loss — Hearsay — Admissions — Affidavit.
- § 217. Documents beyond the jurisdiction of the court — Destruction of documents, etc.

- § 218. Effect of notice to produce.
- § 219. Object of notice to produce — Time of giving.
- § 220. Illustrations of sufficient notice.
- § 221. Requisites of notice.
- § 222. Notice to produce — On whom served.
- § 223. Effect of non-production.
- § 224. When notice to produce is not necessary.
- § 225. Same, continued.
- § 226. Duplicates — Recorded deeds.
- § 227. Effect of the production of papers upon notice.
- § 228. Proof of the contents of lost instruments.
- § 229. Degrees of secondary evidence.
- § 230. Same — Cases illustrating the American rule.
- § 231. Parol evidence not allowed when the law requires copies.
- § 232. Cross-examination of witnesses as to writings.

§ 197. Rule as to best evidence.—The best attainable evidence should be adduced to prove every disputed fact. There are few rules of evidence more frequently invoked in the trial of causes than this, and there certainly is no rule more strongly supported by adjudicated cases. It rests upon the presumption that one who withholds testimony of a higher grade and seeks to substitute therefor testimony of an inferior kind, does so from some improper motive, and because he is conscious that his claim would not be supported by the testimony which he declines to produce. The enforcement of the rule serves the double purpose of affording the court satisfactory rather than unsatisfactory evidence, and of preventing the innumerable frauds which would be

attempted, if parties were at liberty at any time to prove the contents of writings by parol. The rule relating to best evidence does not mean that the most satisfactory evidence, or that which in a given case might be most convincing, must always be produced. It relates rather to the *quality* or grade of the testimony than to its strength or quantity. Thus if two persons witnessed an assault, one in close proximity to the act and the other from a long distance, neither would be excluded from testifying by this rule. A bystander who has listened to a conversation may be called as a witness as well as the participants.¹ If the condition of clothes or of other articles is to be shown they need not be produced in court, but may be described;² and one who witnessed where the lines of a private survey were run, though not a surveyor, may state the fact.³ So handwriting may be proved, not only by the writer, but by another who is familiar with it.⁴ Many other instances might be given as illustrations that this rule does not exclude evidence merely because it is not of the most conclusive character or because it is not all of the evidence which might be offered.⁵ The words "best evidence," as used in the rule, have thus gained a legal signification as distinguished from their popular meaning. Testimony is not excluded by reason of the rule requiring the best evidence unless it shows upon

its face that there is a higher grade of testimony, in other words that there is an attempted substitution of an inferior for a better class of testimony.⁶

1, *Richardson v. Milburn*, 17 Md. 67.

2, *Com. v. Pope*, 103 Mass. 440.

3, *Richardson v. Milburn*, 17 Md. 67.

4, *Ainsworth v. Greenlee*, 1 Hawks (N. C.) 190; *Fairlie v. Hastings*, 10 Ves. Jr. 123; *Rex v. Benson*, 2 Camp. 508. See secs. 558 *et seq. infra*.

5, 3 Phil. Ev. p. 436; 1 Greenl. Ev. sec. 82; *United States v. Keyburn*, 6 Peters 352, 367.

6, This is illustrated by the cases already cited.

§ 198. Primary and secondary evidence.—It will be found that the cases illustrating the application of the rule under discussion generally relate in some way to written evidence, or to the attempted substitution of parol for documentary evidence. There may be infinite discussion as to the relative weight of different kinds of oral testimony, but there is no room for doubt but that a deed affords better evidence of its own contents than the statements of a person who has read it. The deed itself is not only more convincing and satisfactory evidence, but a higher grade of evidence.' When an original document is placed in evidence, it affords what is known as *Primary Evidence* of its contents. In the case just mentioned the deed is such primary evidence and is in a

strict legal sense the best evidence of what it contains. As distinguished from this class, any evidence of a lower degree, as for example a copy or the recollection of the witness, is *Secondary Evidence*. It is the most important application of the general rule under discussion that secondary evidence of the contents of written instruments cannot be given, unless some legal excuse is shown for failing to produce the original. What constitutes such legal excuse will be discussed hereafter; but it is very clear that mere neglect or inattention constitutes no such excuse. It is incumbent on litigants to prepare their testimony in advance; and if it is discovered during the trial for the first time that the best evidence of the fact to be proved is a writing, the rule that the writing must be produced will nevertheless be enforced.²

1, *State v. McDonald*, 65 Me. 467; *Elliott v. Van Buren*, 33 Mich. 50, 53; *Clifton v. United States*, 4 How. 242.

2, *Scarborough v. Reynolds*, 12 Ala. 252; *Hoitt v. Moulton*, 21 N. H. 586. This is illustrated by many of the cases below cited. See also secs. 212, 213 *infra*.

§ 199. Illustrations of the rule — Public writings. — The wide application of the rule under discussion will be best shown by giving instances in which it has been held that the original documents must be produced in evidence or their absence excused in some of the modes hereafter explained. The best evidence of the conviction

of a criminal offense is the record thereof.¹ A judgment is proved, not by the execution² nor by parol evidence, but by the judgment itself.³ And it may be stated generally that the record or, in proper cases, certified copies of the record should be produced to show transactions in judicial proceedings, such as the order of a court *nunc pro tunc*⁴ and other orders,⁵ a plea in abatement,⁶ former recovery,⁷ contents of a verdict,⁸ probate of a will or letters of administration,⁹ pleadings,¹⁰ discontinuance of suit,¹¹ the levy of an execution,¹² mode of serving process,¹³ the filing of papers with the clerk of the court,¹⁴ the binding over of a prisoner for trial,¹⁵ a sale of land by order of court¹⁶ and discharge in bankruptcy.¹⁷ So if divorce is to be proven the decree must be produced,¹⁸ and the issue joined in a former suit should be shown by the pleadings.¹⁹ The best evidence of a pardon is not the minutes made by the governor, but the document itself.²⁰ Parol evidence of a tax sale under execution²¹ or of a seizure and sale under a distress warrant cannot be shown to prove title.²² So the best evidence of an adoption is the instrument by which the adoption was made;²³ and the contents of writs,²⁴ executions,²⁵ processes and the returns thereof,²⁶ warrants,²⁷ awards,²⁸ the examination of a prisoner before a magistrate when required to be written down²⁹ and the authority in writing to draw a draft³⁰ cannot

be shown without the production of the originals, unless the proper foundation is laid for secondary evidence. When it is a matter of record, parol evidence is not admissible to prove the enlistment³¹ or the desertion of a soldier,³² the fact that a person has been in the penitentiary,³³ the vacation of a public street,³⁴ the established grade of a street,³⁵ the conformity of a plat to the statute,³⁶ the contents of books and records in public offices,³⁷ the sale of public land,³⁸ the proceedings of private and municipal corporations of which records are kept,³⁹ the records of proceedings of a county board⁴⁰ or of a school board⁴¹ and the contents of articles of corporate organization.⁴² So the best evidence of what the fire limits of a city are is the city ordinance establishing those limits;⁴³ and the best proof of the heading of a hotel register is the register itself.⁴⁴

1, *State v. Edwards*, 19 Mo. 674; *People v. Benjamin*, 2 Park. Cr. (N. Y.) 201; *Rathbun v. Ross*, 46 Barb. 127; *People v. Reinhart*, 39 Cal. 449; *People v. Melvane*, 39 Cal. 614; *People v. McDonald*, 39 Cal. 697; *Baltimore & O. Ry. Co. v. Rambo*, 59 Fed. Rep. 75; *Southern Ins. Co. v. White*, 58 Ark. 277.

2, *Smallwood v. Violet*, 1 Cranch C. C. 516; *Sharp v. Wickliffe*, 3 Litt. (Ky.) 10; 14 Am. Dec. 37.

3, *Mills v. Barnes*, 4 Blackf. (Ind.) 438; *Stromburg v. Earick*, 6 B. Mon. (Ky.) 578; *McNiel v. Donahue*, 44 Ill. App. 42. Proof of loss of certified copy of judgment rendered in another state does not admit parol evidence, the

original still being in existence, *Kenzler v. Kenzler*, 3 Wash. 166; 28 Am. St. Rep. 21 and note.

4, *Ludlow v. Johnston*, 3 Ohio 553; 17 Am. Dec. 609.

5, *State v. Longinean*, 6 La. An. 700; *State v. Smith*, 12 La. An. 349.

6, *Woodard v. Stark*, 4 S. Dak. 588.

7, *Inman v. Jenkins*, 3 Ohio 271.

8, *Abrams v. Smith*, 8 Blackf. (Ind.) 95.

9, *Jones v. Goodrich*, 5 Moody P. C. 16; *Allen v. Dundas*, 3 T. R. 125; *Ryves v. Wellington*, 9 Beav. 579; *Hood v. Barrington*, 6 Eq. 218; *Graham v. Whitely*, 26 N. J. L. 254; *Cogswell v. Burtis*, 1 Hoff. Ch. (N. Y.) 198; *Elden v. Keddell*, 8 East 187; *Davis v. Williams*, 13 East 232.

10, *Beach v. Baldwin*, 9 Conn. 476.

11, *Sheldon v. Frink*, 12 Pick. 568.

12, *McKee v. McKee*, 16 Md. 516; *West v. St. John*, 63 Iowa 287.

13, *Reilly v. Cavanaugh*, 29 Ind. 435.

14, *Peterson v. Taylor*, 15 Ga. 483; 60 Am. Dec. 705.

15, *Smith v. Smith*, 43 N. H. 536.

16, *Phillips v. Costley*, 40 Ala. 486.

17, *Regan v. Regan*, 72 N. C. 195.

18, *Tice v. Reeves*, 30 N. J. L. 314.

19, *State v. Thompson*, 19 Iowa 299; *Dygert v. Coppernoll*, 13 Johns. 210.

20, *Spalding v. Saxton*, 6 Watts (Pa.) 338.

21, *Sharp v. Spier*, 4 Hill (N. Y.) 76; *Doughty v. Hope*, 3 Den. (N. Y.) 594; *Whitney v. Thomas*, 23 N. Y. 281.

22, *McKee v. McKee*, 16 Md. 516; *Myers v. Smith*, 27 Md. 91; *Wynne v. Aubuchon*, 23 Mo. 30; *Shiver v. Bentley*, 78 Ga. 537.

23, *McCollister v. Yard*, (Iowa) 57 N. W. Rep. 447.

24, *Brush v. Taggart*, 7 Johns. 19.

25, *Perry v. Whipple*, 38 Vt. 278; *Wells v. Bourne*, 113 N. C. 82.

26, *Pendexter v. Carleton*, 16 N. H. 482; *Glascok v. Nave*, 15 Ind. 457.

27, *Ross v. Pleasants*, 3 Pa. St. 408.

28, *Scarborough v. Reynolds*, 12 Ala. 252.

29, *State v. Grove*, Mart. (N. C.) 43; *O'Connell v. State*, 10 Tex. App. 567; *Wright v. State*, 50 Miss. 332. See also, *Cicero v. State*, 54 Ga. 156.

30, *Tinsley v. Penniman*, 83 Tex. 54.

31, *Atwood v. Winterport*, 60 Me. 250.

32, *Terrell v. Colebrook*, 35 Conn. 188.

33, *State v. Lewis*, 80 Mo. 110.

34, *Lathrop v. Central Iowa Ry. Co.*, 69 Iowa 105.

35, *Pittsfield v. Bamstead*, 38 N. H. 115; *Farrar v. Fessenden*, 39 N. H. 268; *Livingston v. Hudson*, 85 Ga. 835.

36, *Bemis v. Becker*, 1 Kan. 226.

37, *Angell v. Rosenbury*, 12 Mich. 241; *Bartlett v. Patton*, 33 W. Va. 71.

38, *Chicago v. McGraw*, 75 Ill. 566.

39, *Perryman v. Greenville*, 51 Ala. 507; *Owings v. Speed*, 5 Wheat. 424; *Bradley v. McKee*, 5 Cranch C. C. 298; *Coffin v. Collins*, 17 Me. 440; *Methodist Chapel v. Herrick*, 25 Me. 354; *Smith v. Natchez Steamboat Co.*, 2 Miss. 479; *Haven v. New Hampshire Asylum*, 13 N. H. 532; 38 Am. Dec. 512; *Pittsburg Ry. Co. v. Clarke*, 29 Pa. St. 146; *Slack v. Norwick*, 32 Vt. 818; *Children v. Huntington*, 34 W. Va. 457.

40, *Yavapai County v. O'Neill*, (Ariz.) 29 Pac. Rep. 430; *State v. Central Ry. Co.*, 17 Nev. 259.

41, *Kane v. School District*, 48 Mo. App. 408; *Whitehead v. School District*, 145 Pa. St. 418.

42, *Warner v. Daniels*, 1 Wood. & M. (U. S.) 90.

43, *Miller v. Sergeant*, (Ind. App.) 37 N. E. Rep. 418.

44, *Grauley v. Jermyn*, 163 Pa. St. 501.

§ 200. Application of the rule — Private writings.—It will be observed that most of the illustrations given in the last section relate to matters more or less public in their nature, matters as to which the law generally requires some record to be kept. But the rule is by no means limited in its application to writings of this character. The paper in question may be of a private character, as a contract, memorandum or letter. If it becomes necessary to prove the contents of the document, it must be produced or its absence accounted for. Thus the rule has been held applicable to deeds,¹ wills,² leases,³ notes and mortgages,⁴ contracts,⁵ letters,⁶ telegrams,⁷ written or printed rules of a railway company,⁸ books of account,⁹ receipts,¹⁰ and indeed to almost every variety of written instruments. A reference to a few special cases will further illustrate the scope and meaning of the rule. Thus, in an action on a building contract, if the plaintiff would show that the work corresponds to the plans, he should produce them.¹¹ In an action for labor commenced under a written contract, though the claim is for extra work, the contract should be produced, unless it is shown that the work was entirely distinct from that named in the contract.¹² If it is material to prove that a party has a life lease of a farm, the lease must be produced.¹³ Though occupancy under a lease may be shown by parol,

the terms of the lease, as the amount of rent and the length of the term, must be shown by the written contract, if there be one.¹⁴ So it was held that parol evidence could not be given that a certain letter, not produced, was a letter of credit;¹⁵ nor that a former bill of less amount than a later one had been presented;¹⁶ nor as to the terms of a wager reduced to writing;¹⁷ nor that complaints had been made by a letter, not produced;¹⁸ nor as to the contents of an article in a newspaper,¹⁹ nor of books of account,²⁰ nor of the contents of an invoice of goods,²¹ nor as to the transfer of stock on corporate books.²² nor, in a criminal prosecution, that a person is a pensioner of the government.²³ Many of the cases already cited are those in which one of the *parties* to the contract or other writing was also a party in the action. For the most obvious and cogent reasons those who have voluntarily reduced their agreement to writing for the express purpose of avoiding mistakes or uncertainty ought not to be allowed to prove that agreement by inferior evidence. But the rule has a much wider application. It is said by a leading text writer on the subject that "oral evidence cannot be substituted for any writing the existence of which is disputed and which is material either to the issue between the parties or to the credit of witnesses and is not merely the memorandum of some other fact."²⁴

1, *Marriner v. Denison*, 78 Cal. 202; *Ebersole v. Rankin*, 102 Mo. 488; *Bell v. Kendrick*, 25 Fla. 778; *Terpening v. Holton*, 9 Col. 306; *Georgia Pac. Ry. Co. v. Strickland*, 80 Ga. 776; 12 Am. St. Rep. 282 and note; *Phillips v. O'Neal*, 87 Ga. 727; *Collar v. Collar*, 86 Mich. 507.

2, *Morrill v. Otis*, 12 N. H. 466.

3, *Dikes v. Miller*, 24 Tex. 417; *Burks v. Bragg*, 89 Ala. 204.

4, *Solomon v. Creech*, 82 Ga. 445; as to the filing of a chattel mortgage, *Curtis v. Wilcox*, 91 Mich. 229.

5, *Clow v. Brown*, 134 Ind. 287.

6, *Brown v. Jewett*, 18 N. H. 230; *King v. Worthington*, 73 Ill. 161; *Watkins v. Paine*, 57 Ga. 50; *Goodrich v. Weston*, 102 Mass. 362; 3 Am. Rep. 469; *Watson v. Roode*, 30 Neb. 264; *Mugge v. Adams*, 76 Tex. 448; *Moore v. Dickinson*, 39 S. C. 441; *Rumbaugh v. Improvement Co.*, 112 N. C. 751; *Smith v. Brown*, 151 Mass. 338.

7, *Durkee v. Vermont Central Ry. Co.*, 29 Vt. 127; *Anheuser-Busch Assn. v. Hutmacher*, 127 Ill. 652; *Nichols v. Howe*, 43 Minn. 181.

8, *Price v. Richmond & D. Ry. Co.*, 38 S. C. 199; *Louisville & N. Ry. Co. v. Orr*, 94 Ala. 602.

9, *Phillips v. Trowbridge Co.*, 86 Ga. 699; *Brayton v. Sherman*, 119 N. Y. 623. Original books of entry are best evidence, instead of the ledger, *Bennett v. Bennett*, 37 W. Va. 396; *Roden v. Brown*, (Ala.) 15 So. Rep. 538.

10, *Jackson v. Lewis*, 29 S. C. 193. But a depositor in a bank may testify of his own knowledge as to the amount deposited, *Simmons Hardware Co. v. Bank of Greenwood*, 41 S. C. 177; *Davis v. Alston*, 61 Ga. 225; *Steed v. Knowles*, 97 Ala. 573; *State v. Reed*, 45 La. An. 162.

11, *Bryant v. Stillwell*, 24 Pa. St. 314.

12, *Tayl. Ev. sec. 402* and cases there cited.

13, *Wallace v. Wallace*, 62 Iowa 651.

14, *Rex v. Merthyr Tydvil*, 1 Barn. & Adol. 29; *Augustein v. Challis*, 1 Exch. 279; *Brewer v. Palmer*, 3 Esp. 213; *Fenn*

v. Griffith, 6 Bing. 533; Thunder v. Warren, 8 Ir. Law R. 181; Rudge v. McCarthy, 4 Ir. Law R. 161; Gear Land. & Ten. sec. 76.

15, Rawson v. Curtis, 19 Ill. 456.

16, Stratford v. Ames, 8 Allen 577.

17, Frazee v. State, 58 Ind. 8.

18, Beall v. Poole, 27 Md. 645.

19, Bond v. Central Bank, 2 Ga. 92.

20, State v. Rosenfield, 35 Mo. 472; Hall v. Lyons, 29 W. Va. 410; Thompson v. Fry, 7 Blackf. (Ind.) 608.

21, Coder v. Statte, 51 Kan. 382.

22, Skowhegan Bank v. Cutler, 49 Me. 315. The best evidence of the subscription for stock is the subscription itself instead of the stock ledger, Taussig v. Glenn, 51 Fed. Rep. 409.

23, United States v. Scott, 25 Fed. Rep. 470.

24, 1 Greenl. Ev. sec. 88.

§ 201. The rule does not exclude evidence unless objection is made.—The rule excluding secondary evidence, when that which is primary is attainable, is not so rigid as to be enforced if no objection is made by the party against whom the inferior evidence is offered. It frequently happens that secondary evidence is admitted, and thus becomes primary, when it might have been excluded if proper objection had been taken.¹ If a *prima facie* case or defense can be made without the use of a document relating thereto, it is no sufficient answer that there is such writing, unless the other party produces it in evidence.² But it is the common prac-

tice, when a witness is testifying as to a fact or contract, for the opposite counsel to interpose and ask the *preliminary question* whether such agreement is in writing, and if it so appears, the writing must be produced or its absence legally accounted for. It is the province of the presiding judge to pass upon all preliminary questions relating to the admissibility of secondary evidence and to determine the facts necessary to the decision of such questions. If the judge admits secondary evidence, it is presumed that he has found as facts all such preliminary matters; and such finding is conclusive unless the exceptions are preserved according to the practice of the jurisdiction.³ Mr. Stephen thus states the rule: "Questions as to the existence of facts rendering secondary evidence of the contents of documents admissible are to be decided by the judge, unless in deciding such a question the judge would, in effect, decide the matter in issue."⁴

1, *Magnay v. Knight*, 1 Man. & G. 944; *Stephens v. Pinney*, 8 Taunt. 327; *Marston v. Deane*, 7 Car. & P. 13; *Fry v. Chapman*, 5 Dowl. 265; *R. v. Padstow*, 4 Barn. & Adol. 208; *Reed v. Deere*, 7 Barn. & C. 261; *Hattersley v. Burrows*, 4 Col. App. 538; *Orr & Lindsley Shoe Co. v. Vance*, 44 Mo. App. 461; *Lehigh Valley Coal Co. v. Ward*, 149 Pa. St. 119.

2, See cases cited above.

3, *Witcher v. McLaughlin*, 115 Mass. 167; *Mason v. Libbey*, 90 N. Y. 683, where the instrument has been destroyed. See sec. 214 *infra*; and also sec. 171 *supra*.

4, *Steph. Ev. art.* 71 p. 139.

§ 202. Qualifications of the rule — Independent and collateral facts.—It often happens that parol testimony as to a fact may be primary evidence although there is written evidence of the same fact. If the essential fact to be proved is not the contents of a written instrument, but an *independent fact* to which the writing is merely *collateral* or of which it is merely an incident, there is no reason for the application of the rule under discussion. In such cases the contents of the document are no part of the issue and there is no agreement that the writing shall be the sole repository of the fact. When the parol evidence is as near to the fact testified as to the writing itself, then each is primary. Thus, the payment of money or the settlement of an account may be proved by parol, although the act is accompanied by a receipt,¹ but not the contents of the receipt.² So parol evidence may be given of actual receipt of rents and profits in an action for accounting, though books were kept;³ so it may be proved by parol that new notes were taken in payment of a debt;⁴ that certain personalty was listed for taxation;⁵ that a judgment⁶ or tax has been paid;⁷ that a third person owes a debt, when notes evidencing the same are not produced;⁸ that a claim was settled before suit was begun;⁹ what was the consideration of a guaranty,¹⁰ and that a telegram had been received.¹¹ So transactions at an auction may

be stated by any one present,¹² and the value of goods may be shown although the witness has a bill showing their cost.¹³ Parol evidence may be given that a sale was made and of the time of the sale, although the contract was in writing;¹⁴ so as to an execution sale, its validity not being in question.¹⁵ So it may be shown that the witness held a mortgage on certain property,¹⁶ as well as the amount of the same.¹⁷ Parol evidence may be given that a verbal sale was made, although a written bill of sale is subsequently accepted;¹⁸ that a purchase at a sheriff's sale was for the benefit of a third person,¹⁹ and that there was a fraudulent combination at a sale of land;²⁰ and after proof of an execution sale it may be shown by parol that a deed was executed and delivered.²¹ The time of birth of a person may be proved by himself or others cognizant of the fact, though there is a written family record of births.²² So marriage may be proved by parol and without producing the registry or certificate, though a registry is required by law.²³ Tenancy and occupancy, though under a written lease, may be proved by parol,²⁴ but not the terms of the lease;²⁵ so the fact of the leasing of a railway;²⁶ that certain land was sold for a given sum;²⁷ that a person was omitted in a will;²⁸ that a road is a highway though never laid out,²⁹ and what lands are used by a railroad for depot grounds may be proved by parol.³⁰

Parol evidence may be given of a verbal contract, though a written memorandum thereof was made and read at the time,³¹ or of a verbal demand, though accompanied by a written one,³² or of the fact that A. is a hotel-keeper, although he has a license,³³ and of the time at which trains are due, though there is a printed time-table.³⁴ The fact that a passenger bought a ticket over several roads having coupons attached may be proved by parol,³⁵ as well as what issues were determined in a former suit where the record is not conclusive³⁶ or where the declaration was lost.³⁷ So parol evidence may be given that a suit has been tried³⁸ and that an arbitrator had been substituted by agreement for one appointed by the court;³⁹ or that an agent has been appointed, though the appointment is in writing, but the scope of his powers must be shown by the writing.⁴⁰ Other illustrations of collateral facts or incidents which may be proven by parol are the attendance of witnesses and jurors at court,⁴¹ that two records relate to the same cause of action,⁴² the time of issuing a writ,⁴³ that copies of an ordinance produced had been posted, the fact of publication and not the contents being in issue,⁴⁴ and that town officers were duly sworn, the record being silent on the subject.⁴⁵ And it may be stated more generally that when the identity or genuineness of a writing is involved those facts may be proved by parol;⁴⁶ and parol evidence may

be given of the contents of a writing to show its identity with or diversity from another writing without accounting for its absence.⁴⁷

1, *Meade v. Keane*, 3 Cranch C. C. 51; *Berry v. Berry*, 17 N. J. L. 440; *Kingsbury v. Moses*, 45 N. H. 222; *Page v. Einstein*, 7 Jones (N. C.) 147; *Wolf v. Foster*, 13 Kan. 116.

2, *Townsend v. Atwater*, 5 Day (Conn.) 298.

3, *Wilcox v. Bates*, 58 Wis. 128.

4, *Daniel v. Johnson*, 29 Ga. 207.

5, *Hewitt v. State*, 121 Ind. 245.

6, *Planters' Bank v. Borland*, 5 Ala. 531.

7, *Davis v. Hare*, 32 Ark. 386.

8, *Duffie v. Phillips*, 31 Ala. 571.

9, *Arnold v. Arnold*, 20 Iowa 273.

10, *Nichols v. Bell*, 1 Jones (N. C.) 32.

11, *Connor v. State*, 23 Tex. App. 378; *Western Union Tel. Co. v. Cline*, 8 Ind. App. 364.

12, *Austin v. Boyd*, 23 Mo. App. 317.

13, *Savannah Ry. Co. v. Hoffmayer*, 75 Ga. 410.

14, *Thompson v. Mapp*, 6 Ga. 260; *Martin v. Bowie*, 37 S. C. 102; *Gallagher v. London Assurance Corp.*, 149 Pa. St. 25.

15, *Stanley v. Sutherland*, 54 Ind. 339.

16, *File v. Springel*, 132 Ind. 312.

17, *Hyde v. Shank*, 93 Mich. 535.

18, *Sanders v. Stokes*, 30 Ala. 432.

19, *Hoagland v. Hoagland*, 2 N. J. Eq. 501.

20, *Miltenberger v. Morrison*, 39 Mo. 71.

21, *Uhl v. Moorhous*, 137 Ind. 445; *Armstrong v. McCoy*, 8 Ohio 128; 31 Am. Dec. 435.

22, *Beeler v. Young*, 3 Bibb (Ky.) 520; *Central Ry. Co. v. Coggin*, 73 Ga. 689; *Morrison v. Emsley*, 53 Mich. 564;

Evans v. Morgan, 2 Crompt. & J. 453; R. v. Manaring, Dears. & B. Cr. C. 132; Morris v. Miller, 4 Burr. 2057; Carskadden v. Poorman, 10 Watts (Pa.) 82; 36 Am. Dec. 145; State v. Woods, 49 Kan. 237; Dobson v. Cothran, 34 S. C. 518.

23, Com. v. Norcross, 9 Mass. 492; Nixon v. Brown, 4 Blackf. (Ind.) 157; Com. v. Dill, 156 Mass. 226; State v. Hodgskins, 19 Me. 155; 36 Am. Dec. 742 and important note.

24, Rayner v. Lee, 20 Mich. 384; Twyman v. Knowles, 13 C. B. 222.

25, See note 14 sec. 200 *supra*.

26, Central Ry. Co. v. Whiteland, 74 Ga. 441.

27, Robinson v. Tipton, 31 Ala. 595.

28, Bulger v. Ross, 98 Ala. 267.

29, Woburn v. Henshaw, 101 Mass. 193; 3 Am. Rep. 333.

30, Fowler v. Farmers' Loan Co., 21 Wis. 77.

31, Lathrop v. Bramhall, 64 N. Y. 365.

32, Smith v. Young, 1 Camp. 439.

33, Owings v. Wyant, 3 Har. & McH. (Md.) 393.

34, Chicago Ry. Co. v. George, 19 Ill. 510; 71 Am. Dec. 239.

35, Central Ry. Co. v. Wolff, 74 Ga. 664.

36, Justice v. Justice, 3 Ired (N. C.) 58; Lander v. Arno, 65 Me. 26; Hickerson v. Mexico, 58 Mo. 61; Rake v. Pope, 7 Ala. 161; State v. DeWitt, 2 Hill (S. C.) 282.

37, Butler v. Slam, 50 Pa. St. 456.

38, Johnston v. Hamburger, 13 Wis. 195.

39, Douglass v. Brandon, 6 Baxt. (Tenn.) 58.

40, Whitfield v. Brand, 16 M. & W. 282.

41, Baker v. Brill, 15 Johns. 260; Massey v. Westcott, 40 Ill. 160.

42, Perkins v. Walker, 19 Vt. 144; Com. v. Sutherland, 109 Mass. 342; Davisson v. Gardner, 10 N. J. L. 289;

Butler v. Slam, 50 Pa. St. 456; Fed. Hill Co. v. Mariner, 15 Md. 224; Porter v. State, 17 Ind. 415; Rake v. Pope, 7 Ala. 161; Shirley v. Fearn, 33 Miss. 653; 69 Am. Dec. 375.

43, Den v. Hamilton, 12 N. J. L. 109.

44, Teft v. Size, 10 Ill. 432.

45, Pease v. Smith, 24 Pick. 122.

46, Scott v. Jones, 4 Taunt. 865; Read v. Gambly, 10 Adol. & Ell. 597; Bucher v. Jarratt, 3 Bos. & P. 145; How v. Hall, 14 East 275; Darby v. Ouseley, 1 Hurl. & N. 1; Com. v. Messinger, 1 Binn. (Pa.) 274; 2 Am. Dec. 441; McLean v. Harizog, 6 Serg. & R. (Pa.) 154; McGinnis v. State, 24 Ind. 500; Ross v. Bruce, 1 Day (Conn.) 100.

47, West v. State, 22 N. J. L. 212.

§ 203. Same, continued — Corporate acts.—It has been held that if a corporation postpones making a record of its proceedings its acts may be proved by parol.¹ So it has been held that the election of directors may be proved by a person who was present.² It may also be proved that stock had been distributed and a large number of bills issued,³ and that subscriptions to stock in a large amount were solicited and obtained by an agent.⁴ It was held admissible for the secretary of a corporation to state that no vote of a given character had ever been taken by the corporation,⁵ and that parol evidence may be given of the acts done in organizing a corporation, but not of the contents of its articles.⁶ Such proof may be given of the date of filing articles of incorporation, that being no part of the articles.⁷ Parol evidence may be given

of the publication of an ordinance;⁸ and the intention of a corporation to dedicate a road to the public may be shown by its acts and the testimony of its officers.⁹ By failing to keep a record of its proceedings a corporation may be estopped from objecting to parol evidence of its acts.¹⁰ When the records of a corporation are excluded because the corporation was not legally organized, oral evidence is admissible to show who are acting officers.¹¹

1, Bay View Assn. v. Williams, 50 Cal. 353. See notes, 13 Am. St. Rep. 550; 74 Am. Dec. 309.

2, Partridge v. Badger, 25 Barb. 146.

3, Banks v. Darden, 18 Ga. 318.

4, Low v. Connecticut Ry. Co., 45 N. H. 370.

5, Smith v. Richards, 29 Conn. 232.

6, Miller v. Wild Cat Co., 52 Ind. 51.

7, Johnson v. Crawfordsville Ry. Co., 11 Ind. 280.

8, Teft v. Size, 10 Ill. 432; Des Moines v. Casady, 21 Iowa 570.

9, People v. Ell River & E. Ry. Co., 98 Cal. 665.

10, Scott v. Jackson Methodist Church, 50 Mich. 528; Pickett v. Abney, 84 Tex. 645.

11, People v. Leonard, (Cal.) 39 Pac. Rep. 617.

204. Appointment and acts of public officers — Writings not producible, etc. Although persons become officers by election or appointment, the record of such election or appointment is not the only evidence that they are such officers. The usual pre-

sumption that the written evidence is withheld from some improper motive does not apply in such cases. Moreover the public convenience requires that parol evidence should be allowed to prove that public officers are such officers. Accordingly proof that one has *acted notoriously as a public officer* is *prima facie* evidence of his official character, and his commission need not be produced.¹ The same rule prevails both in civil and in criminal cases and whether the officer is or is not a party to the record.² It was held admissible to prove by parol that a person taking an acknowledgment was a justice³ or deputy clerk⁴ at the time of taking such acknowledgment; that A. was a magistrate in an action on a recognizance taken before him;⁵ that B. was president of a corporation,⁶ and that one was admitted to practice as a land attorney.⁷ But where an act of congress provided the manner in which commissioners for the division of certain lands should be appointed and how the evidence of their election should be preserved as a record, it was held that a certified copy of the record was the best evidence.⁸ It is a well recognized exception to the general rule that secondary evidence may be given of writings which *cannot be produced* in court. For example, of inscriptions which are traced upon mural monuments, walls and stones, as well as surveyors' marks on trees. As an illustration, parol evidence was allowed

to be given of the handwriting of one who had written a libel on the wall of the jail;⁹ but the evidence must show that the writing cannot without great difficulty be removed or produced in court.¹⁰ On the same principle secondary evidence is allowed to be given of a document which is in a *foreign country* and which cannot be obtained.¹¹ And where books, the contents of which are of great public concern and the removal of which would be very inconvenient, are *kept in public offices*, secondary evidence of their contents may be given. Thus, copies have been received of portions of books of the Bank of England and of the books of excise and customs. It is on the same general principle and on grounds of public convenience that the existence and contents of judicial and other *public records* required by law to be kept may be proved by an examined copy. It is also in recognition of the same principle that state and federal statutes make many special provisions for the proof of public records by properly authenticated copies. The risk of loss from removal of records, the public convenience and the absence of any motive in public officers to make false copies, are all considerations that lead to these exceptions to the general rule. There is a class of writings of so *transient* a nature that the court may readily assume they cannot be produced in court and as to which secondary evidence may be allowed.

For example, inscriptions on flags and banners at public meetings,¹² notices which have been posted¹³ and the writing on a trunk tag.¹⁴ It has even been held that the contents of resolutions read at a public meeting may be proved by parol as they are of the nature of speeches.¹⁵

1, Wilcox v. Smith, 5 Wend. 231; 21 Am. Dec. 213; Plymouth v. Painter, 17 Conn. 585; 44 Am. Dec. 574; Burke v. Elliott, 4 Ired. (N. C.) 355; 42 Am. Dec. 142; McCoy v. Curtice, 9 Wend. 17; 24 Am. Dec. 113; Cabot v. Given, 45 Me. 144; State v. Row, 81 Iowa 138; Rex v. Gordon, 2 Leach Cr. C. 515; Bank of United States v. Dandridge, 12 Wheat. 70; Cannell v. Curtis, 2 Bing. N. C. 228; Burke v. Cutler, 78 Iowa 299; James v. State, 41 Ark. 451; North v. People, 139 Ill. 81. See sec. 108 *et seq. supra*, as to judicial notice of existence and duties of officers.

2, Rex v. Gordon, 2 Leach Cr. C. 515; Berryman v. Wise, 4 T. R. 366; McGahey v. Alston, 2 M. & W. 206; Radford v. McIntosh, 3 T. R. 632; Doe *ex dem.* James v. Brawn, 5 Barn. & Ald. 243; Rex v. Jones, 2 Camp. 131.

3, Rhoades v. Salin, 4 Wash. 715; Bank of United States v. Benning, 4 Cranch C. C. 81; Shultz v. Moore, 1 McLean (U. S.) 520; State v. McNally, 34 Me. 210; 56 Am. Dec. 650.

4, Tatom v. White, 95 N. C. 453.

5, Webber v. Davis, 5 Allen 393.

6, Brown v. La Crosse City Gas Co., 21 Wis. 51.

7, Bourke v. Whiting, 19 Col. 1.

8, Bovee v. McLean, 24 Wis. 225.

9, Mortimer v. McCallen, 6 M. & W. 67.

10, Jones v. Tarleton, 9 M. & W. 675.

11, Alivon v. Furnival, 1 Cromp., M. & R. 277; Boyle v. Wiseman, 10 Exch. 647; Quilter v. Jorss, 14 C. B. N. S. 747. See notes, 28 Am. St. Rep. 24; 24 Am. St. Rep. 822.

12, *Rex v. Hunt*, 3 Barn. & Ald. 566; *Sheridan & Kirwin's Case*, 31 How. St. Tr. 672; 1 Greenl. Ev. sec. 90.

13, *State v. Credle*, 91 N. C. 640; *Teft v. Size*, 10 Ill. 432; *Polley v. McCall*, 37 Ala. 20; *Kelly v. Taylor*, 23 Cal. 11; *McMillan v. Baxley*, 112 N. C. 578.

14, *Com. v. Morrell*, 99 Mass. 542.

15, *Rex v. Hunt*, 3 Barn. & Ald. 566; *Sheridan & Kerwin's Case*, 31 How. St. Tr. 672.

205. Multiplicity of documents — General results.—Another relaxation of the rule based on the necessity of the case may be thus stated. Where the originals consist of numerous documents which cannot be conveniently examined in court, and the fact to be proved is the general result of an examination of the whole collection, evidence may be given as to such result by any person who has examined the documents and who is skilled in such matters, provided the result is capable of being ascertained by calculation.¹ Thus a witness has been allowed to testify orally as to the balance of accounts after inspection;² on the same theory it has been held that one who has examined the books of account of another may state the general result,³ as showing solvency or insolvency. It was held by the supreme court of the United States that a witness might give the result of his examination of bank books in another state.⁴ But in other cases parol evidence of this character giving a summary of bank books⁵ or railway books⁶ has been

rejected. Where bills of exchange have invariably been drawn in the same way, the fact may be proved without offering the bills in evidence, but this rule does not hold true if the mode of the business had been varied;⁷ and it was held incompetent for a witness to state the general contents of letters received from a party to the action, the object being to show his impression as to whether the writer was friendly or unfriendly toward another person.⁸

1, *Burton v. Driggs*, 20 Wall. 136; *Holbrook v. Jackson*, 7 Cush. 136; Steph. Ev. art. 71.

2, *Roberts v. Doxon*, Peake Ad. Cas. 83; *Wolford v. Farnham*, 47 Minn. 95. See also, *Dupuy v. Truman*, 2 Younge & C. 34. Clearly this is the rule in respect to experts, *Culver v. Marks*, 122 Ind. 554.

3, *Meyer v. Sefton*, 2 Stark. 274.

4, *Burton v. Driggs*, 20 Wall. 125.

5, *Ritchie v. Kinney*, 46 Mo. 298.

6, *McCombs v. Railroad Co.*, 67 N. C. 193; *Fox v. Baltimore Co.*, 34 W. Va. 466.

7, *Spencer v. Billing*, 3 Camp. 310.

8, *Topham v. M'Gregor*, 1 Car. & K. 320.

§ 206. Parol proof of admissions concerning writings — English rule. — Since the celebrated case of *Slatterie v. Pooley*¹ it has been regarded as the settled doctrine in England that the admissions of a party are evidence against himself, although they relate to the contents of formal written

instruments in issue in the case. Mr. Stephen without qualification lays down the rule that the admission of one whose testimony is relevant is primary evidence, though relating to the contents of written instruments.² Accordingly in the English courts parol admissions have been received to prove a debt, although the debt was based on a written agreement,³ to prove the contents of a deed⁴ or the terms of a written lease,⁵ as well as the fact of the prisoner's election to office and the terms of his official bond in embezzlement cases.⁶ In a later case it was held that the acts and conduct of the overseers of the poor in one parish were competent as constituting an admission of the contents of a certain certificate which was required to settle a pauper in such parish.⁷ Mr. Taylor, however, in his work on Evidence questions the correctness of the reasoning on which the English doctrine rests and calls attention to the fact that the courts of Ireland, where the subject has undergone much discussion, have disapproved the English rule.⁸

1, *Slatterie v. Pooley*, 6 M. & W. 664.

2, *Steph. Ev. art.* 64.

3, *Newhall v. Holt*, 6 M. & W. 662.

4, *Slatterie v. Pooley*, 6 M. & W. 664; *King v. Cole*, 2 Exch. 632.

5, *Howard v. Smith*, 3 Man. & G. 254.

6, *R. v. Welch*, 1 Den. Cr. C. 199.

7, Reg. v. Baringstoke, 14 Q. B. 611.

8, Tayl. Ev. secs. 411 *et seq.*

§ 207. Same — Rule in the United States.—In the United States there is an irreconcilable conflict in the decisions on this subject. While some of the cases unqualifiedly approve the English rule, others emphatically dissent. In the leading case sustaining the English doctrine the plaintiff was allowed to prove the admissions of the defendant to the effect that he had prosecuted to final judgment a former action against the defendant. The court used the following language: "The admissions of a party are not open to the same objection which belongs to parol evidence from other sources. A party's own statements and admissions are, in all cases, admissible in evidence against him, though such statements and admissions may involve what must necessarily be contained in some writing, deed or record. Thus, the statements of a party that certain land had been conveyed might be admitted, though the conveyance must be by recorded deed. The general principle as to the production of written evidence as the best evidence does not apply to the admissions of parties, as what a party admits against himself may be reasonably taken as true. The weight and value of the statements and admissions will vary according to the circumstances and must be de-

terminated by the jury."¹ In other cases in this country following the same rule the admissions of a party have been received to prove the contents of letters,² the existence of a partnership based on a written contract,³ the terms of a lease in writing⁴ and the footings of an account.⁵ On the other hand there have been numerous decisions which have maintained the view that there is no principle in the law of evidence authorizing the substitution of the declarations of a party even as against himself for record or written evidence. They lay down the rule that admissions rank only with oral testimony and that, unless made in open court, they are competent only where parol evidence would be admissible to establish the same facts.⁶ Thus, evidence of this character has been held inadmissible to prove corporate organization,⁷ the fact that attachment proceedings are pending,⁸ the fact that a party had been subpoenaed as a witness,⁹ the existence of a bond,¹⁰ the legal effect of a deed¹¹ and the contents of a mortgage.¹² While there are undoubtedly serious objections to the practice of omitting the oral or even the written admissions of a party in respect to the contents of written instruments, yet the weight of authority both in England and America seems to sustain the view that such proof may be received without accounting for the absence of the written instrument.¹³

- 1, *Smith v. Palmer*, 6 Cush. 513.
- 2, *Loomis v. Wadhams*, 8 Gray 557; *Morey v. Hoyt*, 62 Conn. 542.
- 3, *Edwards v. Tracy*, 62 Pa. St. 374.
- 4, *Taylor v. Peck*, 21 Gratt. (Va.) 11.
- 5, *Butler v. Cornell*, 148 Ill. 276.
- 6, *Welland Canal Co. v. Hathaway*, 8 Wend. 480; 24 Am. Dec. 51; *Mason v. Park*, 4 Ill. 532; *Jameson v. Conway*, 10 Ill. 227; *Bivins v. McElroy*, 11 Ark. 23; *Threadgill v. White*, 11 Ired. (N. C.) 591; *Roberts v. Roberts*, 82 N. C. 29.
- 7, *Welland Canal Co. v. Hathaway*, 8 Wend. 480; 24 Am. Dec. 51.
- 8, *Jenner v. Joliffe*, 6 Johns. 9.
- 9, *Hasbrouck v. Baker*, 10 Johns. 248.
- 10, *Fox v. Reil*, 3 Johns. 477.
- 11, *Morrill v. Robinson*, 71 Me. 24.
- 12, *Sherman v. People*, 13 Hun (N. Y.) 575.
- 13, See cases already cited in this section; also *Morey v. Hoyt*, 62 Conn. 542; *Hoefling v. Hambleton*, 84 Tex. 517; *Taylor v. Peck*, 21 Gratt. (Va.) 11; *Edwards v. Tracy*, 62 Pa. St. 374; *Edgar v. Richardson*, 33 Ohio St. 581; *Blackington v. Rockland*, 66 Me. 332; *Loomis v. Wadhams*, 8 Gray 557; *Earle v. Picken*, 5 Car. & P. 542; *Slatterie v. Pooley*, 6 M. & W. 664; *Queen v. Baringstoke*, 14 Q. B. 611.

§ 208. Same — Copies not the best evidence — Duplicates. — It is hardly necessary to cite authorities to the proposition that as a rule written instruments cannot be proved by copies. They are mere secondary evidence and are inadmissible under the general rule unless a basis is laid for the recep-

tion of secondary evidence under some of the rules hereafter stated.¹ Thus letter press copies² and photographs of writings³ are not admissible, if the originals can be obtained. Where a document is executed in *duplicate* or triplicate each one is primary evidence of the contents of the document, and the other need not be produced. In such cases each is deemed an original.⁴ But where a document is executed in *counterpart*, each party signing only the part by which he is bound, each counterpart is the best evidence against the party signing it and his privies.⁵ As to the other party it is only secondary evidence.⁶

1, Robinson v. Beall, 20 Ga. 275; Wallace v. Bradshaw, 6 Dana (Ky.) 382; Halstead v. Cuppy, 67 Iowa 600; Bird v. Bird, 40 Me. 392; Putnam v. Goodall, 31 N. H. 419; Torrey v. Fuller, 1 Mass. 524; Davidson v. Davidson, 10 B. Mon. (Ky.) 115; Knight v. Knight, 12 La. An. 396; Mariner v. Dennison, 78 Cal. 202; Solomon v. Creech, 82 Ga. 445.

2, Packing Co. v. Cannon, 31 Fed. Rep. 313; King v. Worthington, 73 Ill. 161; Watkins v. Paine, 57 Ga. 50; Nodin v. Murray, 3 Camp. 228; Chapin v. Siger, 3 McLean (U. S.) 378; Marsh v. Hand, 35 Md. 123; Merritt v. Wright, 19 La. An. 91; Foot v. Bentley, 44 N. Y. 166; 4 Am. Rep. 652; Com. v. Jeffries, 7 Allen 548; 83 Am. Dec. 712; Nowlen v. Lyon, 73 Mich. 434; Whitney Wagon Works v. Moore, 61 Vt. 230; Smith v. Brown, 151 Mass. 338; State v. Sterling, 41 La. An. 679; Ford v. Cunningham, 87 Cal. 209; Watson v. Roode, 30 Neb. 264. It has been held that a copy of a letter press copy of a lost instrument can be produced as evidence without producing the press copy itself, Goodrich v. Weston, 102 Mass. 362.

3, *Duffin v. People*, 107 Ill. 113; 47 Am. Rep. 431; *Leathers v. Salvor Co.*, 2 Wood (U. S.) 680; *Maclean v. Scripps*, 52 Mich. 214; *Foot v. Bentley*, 44 N. Y. 166.

4, *Lewis v. Payn*, 8 Cow. 71; 18 Am. Dec. 427; *Totten v. Bucy*, 57 Md. 446; *State v. Gurnee*, 14 Kan. 111; *Gardner v. Eberhart*, 82 Ill. 316; *Crossman v. Crossman*, 95 N. Y. 145; *Weaver v. Shipley*, 127 Ind. 526.

5, *Roe v. Davis*, 7 East 362; *Loring v. Whittemore*, 13 Gray 228; *Nicoll v. Burke*, 8 Abb. N. C. (N. Y.) 213; *Cleveland & T. Ry. Co. v. Perkins*, 17 Mich. 296; *Colling v. Treweek*, 6 Barn. & C. 398; *Brown v. Woodman*, 6 Car. & P. 206.

6, *Munn v. Godbold*, 3 Bing. 292; *Packing Co. v. Cannon*, 31 Fed. Rep. 313.

§ 209. The general rule as applied to telegrams — Mode of proof.—The modern authorities establish the rule that telegrams are admissible in evidence, but not without proof that they are genuine.¹ Their authenticity may be shown by proof of the handwriting of some person employed in the telegraph office at the time the telegram was received at the office or of that of the sender,² or by any other suitable means.³ The same rule prevails in regard to telegrams as in regard to other writings, that secondary evidence of their contents can not be received until it has been shown that the original can not be produced.⁴ Thus if the original is *beyond the jurisdiction* of the court, the copy of the message received at the destination may be introduced as secondary evidence.⁵ The same rule holds where it is shown to be the *custom* of the company

to destroy messages received by it after a given period, secondary evidence may then be received as to the contents of the telegram.⁶ But, although the general rule applies to telegrams as well as to other writings, there has been some difficulty in determining *what are original telegrams* within the meaning of the rule that the best evidence must be produced. By the decided weight of authority the question whether the communication sent or the one received is to be deemed the original depends upon which party is responsible for its transmission, in other words upon the question for whom the telegraph company is agent. If there is but a single communication, the dispatch as delivered at the place of destination is the best evidence.⁷ And generally in controversies arising between the sender and the receiver, when the company can be considered the agent of the sender of the message, the message received at the place of destination is to be deemed the original.⁸ One who sends an order by telegraph makes the company his agent for the delivery of the same, and is bound by the message as delivered. The receiver may put in evidence the message as received.⁹ This is upon the principal that any mistake of the company in the act of transmission or delivery is the mistake of the principal in the same manner as if a mistake should be made by any agent in the delivery of any verbal message.

Qui facit per alium, facit per se. But in England a different rule prevails, the message delivered to the company being deemed the primary evidence;¹⁰ and a few cases in this country seem to hold this view.¹¹ While this is true if the answer is a mere acceptance or answer to an offer, yet if the message sent in reply contains *new conditions* or offers, the company would probably be deemed the agent of the one replying and in that case the message as received would be the original on the principle first stated.¹² Of course there must be competent *proof* that the alleged sender did actually *send or authorize* the sending of the message in question.¹³ Although such proof may consist of circumstantial evidence,¹⁴ yet the fact of the delivery of a telegraphic dispatch to a person at a given time and place is not proved by producing an alleged reply signed by him, received at the sending office later on the same day and addressed to the sender of the former dispatch.¹⁵ In controversies between the *sender and the telegraph company*, for example, in an action for failure to properly transmit the message, the primary evidence of the dispatch is the message left with the company for transmission.¹⁶ *In proving a contract* by telegram the best evidence is the telegram containing the offer as received at the point of destination and the dispatch containing the acceptance as *delivered for transmission*. This is in analogy to

the making of contracts by letter where the contract is consummated when the acceptance is delivered for transmission.¹⁷

1, *Burt v. Winona Ry. Co.*, 31 Minn. 472; *Lewis v. Havens*, 40 Conn. 363; *Smith v. Easton*, 54 Md. 138.

2, *Richia v. Bass*, 15 La. An. 668; *Oregon Steamship Co. v. Otis*, 100 N. Y. 446; 53 Am. Rep. 221; *Smith v. Easton*, 54 Md. 138; 39 Am. Rep. 355.

3, *Dunbar v. United States*, 156 U. S. 185.

4, *McCormick v. Joseph*, 83 Ala. 401; *Durkee v. Vermont C. Ry. Co.*, 29 Vt. 127; *Cairo & St. L. Ry. Co. v. Mahoney*, 82 Ill. 73; *Williams v. Brickell*, 37 Miss. 682; *Whilden v. Merchants Bank*, 64 Ala. 1; 38 Am. Rep. 1 and note; *Barons v. Brown*, 25 Kan. 410; *Western Union Tel. Co. v. Hines*, 94 Ga. 430; *Blair v. Brown*, 116 N. C. 631.

5, *Barons v. Brown*, 25 Kan. 410; *Whilden v. Merchants Bank*, 64 Ala. 1; 38 Am. Rep. 1 and note; *Elwell v. Mersick*, 50 Conn. 272.

6, *Flint v. Kennedy*, 33 Fed. Rep. 820; *Riordan v. Guggerty*, 74 Iowa 688; *Smith v. Easton*, 54 Md. 138. See also, *Oregon Steamship Co. v. Otis*, 100 N. Y. 446; 53 Am. Rep. 221; *Western Union Co. v. Kemp*, 55 Ill. App. 583.

7, *Durkee v. Vermont C. Ry. Co.*, 29 Vt. 127; *Anheusser Brew. Co. v. Hutmacher*, 127 Ill. 652; *Trevor v. Wood*, 36 N. Y. 307; 93 Am. Dec. 511; *Saveland v. Green*, 40 Wis. 431; *Nickerson v. Spindell*, (Mass.) 41 N. E. Rep. 105. In an Alabama case it was held unnecessary to decide this question where the telegrams in question were at the time in another state, this being held sufficient to admit secondary evidence, *Shorter v. Shepard*, 33 Ala. 648.

8, *Durkee v. Vermont C. Ry. Co.*, 29 Vt. 127; *Trevor v. Wood*, 36 N. Y. 307; 93 Am. Dec. 511; *State v. Hopkins*, 50 Vt. 316; *Saveland v. Green*, 40 Wis. 431 and cases cited.

9, *Saveland v. Green*, 40 Wis. 431; *Western Union Tel. Co. v. Shatter*, 71 Ga. 760.

10, *Henkel v. Pape*, L. R. 6 Ex. 7.

11, *Matteson v. Noyes*, 25 Ill. 592; *Williams v. Brickell*, 37 Miss. 682; 75 Am. Dec. 88.

12, Redf. Car. sec. 546. See article by Prof. C. G. Tiedeman on "Contracts by Telegraph" in 12 Cent. L. Jour. 365; and one by J. A. Seddon on "Telegrams as Evidence" in 14 Cent. L. Jour. 261.

13, *Smith v. Easton*, 54 Md. 138; 39 Am. Rep. 355; *Oregon Steamship Co. v. Otis*, 100 N. Y. 446; 53 Am. Rep. 221, the primary evidence of this fact is the telegram delivered to the company.

14, *Flint v. Kennedy*, 33 Fed. Rep. 820.

15, *Howley v. Whipple*, 48 N. H. 487.

16, *Western Union Tel. Co. v. Hopkins* 49 Ind. 223; Redf. Car. sec. 546. In *Conyers v. Postal Cable Tel. Co.*, 92 Ga. 619, it was held admissible in such an action to offer the message as delivered to the sender without first calling for or showing inability to obtain the original message. The same was held in *Western Union Tel. Co. v. Blance*, 94 Ga. 431, and also in *Western Union Tel. Co. v. Smith*, (Tex. Civ. App.) 26 S. W. Rep. 216, on proof that the original is out of the jurisdiction, or that it is lost, *Western Union Tel. Co. v. Williford*, (Tex. Civ. App.) 27 S. W. Rep. 700.

17, *Durkee v. Vermont C. Ry. Co.*, 29 Vt. 127; *Howley v. Whipple*, 48 N. H. 487; *Wilson v. Minneapolis & N. Ry. Co.*, 31 Minn. 481; *Saveland v. Green*, 40 Wis. 431; *Smith v. Easton*, 54 Md. 138; 39 Am. Rep. 355; *Beach v. Raritan & D. B. Ry. Co.*, 37 N. Y. 457. See also articles cited in note 12 *supra*.

§ 210. Communications by telephone.

In connection with the subject treated in the last section it may be best to discuss the subject of telephonic communications, although strictly speaking the rule as to best evidence has little, if any, application to such communications. As business expands by the aid

of new inventions wider scope must be given to the rules of evidence. In several instances the courts have acted upon this view in receiving as evidence the statements made at the telephone or to telephone operators and intended to be communicated to another party. In such case the operator may be regarded as the agent of both parties to make and receive such communications.¹ But there are cases holding the stricter rule that, where evidence of the substance of such conversation is sought to be introduced, it must first be shown that the party speaking was recognized either by his voice or in some other manner.² While it is asserted in other cases that the circumstances tending to establish the identity of the speaker are to be considered in determining the *weight* of the evidence, not its admissibility.³ So an acknowledgment of a notary taken by telephone should not be set aside when it appears that the nature and contents of the instrument were correctly stated to the party executing it and there is no pretence of fraud;⁴ and where communication was had by telephone with a railroad company's office, it was presumed that an authorized agent of the company attended to the message and, unless it not being shown that the conversation was carried on by an intruder, the company was bound by the statements coming from its office.⁵ The authorities are, however, not agreed as to the question of the admissibility

of conversations over the telephone which have been taken by some third person and repeated to a party to the action. A Kentucky case has held such evidence competent on the ground that the third person was an agent of the party. This seems to be the trend of the authorities, although in a Georgia case such communications were rejected on the ground that they were pure hearsay.⁶ A late Illinois case holds that a third party may testify to that portion of the conversation over a telephone which is spoken in his presence, although he could not hear the replies and did not know with whom the conversation was held.⁷

1, *Sullivan v. Kuykendall*, 82 Ky. 483; 56 Am. Rep. 901, 906; *Oskamp v. Gadsden*, 35 Neb. 7; 37 Am. St. Rep. 428 and note; 17 L. R. A. 440 and note. See also articles on this subject, 24 Weekly Law Bul. 245, "Are Telephonic Communications Admissible as Evidence;" 23 C. Leg. News 24, "Conversation by Telephone;" also notes, 17 L. R. A. 440; 10 Am. St. Rep. 135.

2, *Oberman Brewing Company v. Adams*, 35 Ill. App. 540; *Murphy v. Jack*, 58 N. Y. S. 458. So also in criminal cases, *People v. Ward*, 3 N. Y. Crim. R. 483; *Stepp v. State*, 31 Tex. Crim. R. 349.

3, *Missouri Pac. Ry. Co. v. Heidenheimer*, 82 Tex. 195; 27 Am. St. Rep. 861; *Wolfe v. Missouri Pac. Ry. Co.*, 97 Mo. 473; 3 L. R. A. 539; 10 Am. St. Rep. 331; *Globe Printing Co. v. Stahl*, 23 Mo. App. 451.

4, *Banning v. Banning*, 80 Cal. 271. See article on "Presence by Telephone," 2 Un. Law. Rev. 31.

5, *Reed v. Burlington Ry. Co.*, 72 Iowa 166; 2 Am. St. Rep. 243; *Rock Island Ry. Co. v. Potter*, 36 Ill. App. 590.

6, *Sullivan v. Kuykendall*, 82 Ky. 483; 56 Am. Rep. 901; *Wilson v. Coleman*, 81 Ga. 297.

7, *Miles v. Andrews*, 153 Ill. 262.

§ 211. **Proof of lost instruments.** — We have already seen that the rule as to the best evidence has various qualifications and limitations. The requirements of this rule are satisfied if the *best attainable evidence* is produced. If it is shown by satisfactory proof that the original instrument has been lost or destroyed, or that it is beyond the jurisdiction of the court or in the possession of the adverse party who refuses to produce it, one of the principal objections to secondary evidence at once disappears and such evidence becomes admissible.¹ It is hardly necessary to cite cases illustrating this rule as to the introduction of secondary evidence. It has been applied to deeds,² writs,³ pleadings,⁴ specialties,⁵ judgments,⁶ other records,⁷ agreements,⁸ banknotes,⁹ books of account,¹⁰ patents,¹¹ wills¹² and time bills for work done.¹³ It is a rule of very general application, especially useful in respect to writings of a more transitory character than those above named. But before secondary evidence of a document is relied on there should be proof that such a document once actually *had existence*¹⁴ and that it was genuine and properly executed.¹⁵ The view has sometimes been held that the existence and execution must first be proved before any proof of loss

is admissible.¹⁰ But in the opinion of the author, the general rule that the *order* of testimony is in the *discretion of the court* should apply in this case.¹⁷

1. Georgia Pacific Ry. Co. v. Strickland, 80 Ga. 776; 12 Am. St. Rep. 282 and note. For cases on this general subject of this section see notes, 28 Am. St. Rep. 24; 24 Am. St. Rep. 822. See secs. 204 *supra*, 217 *infra*.

2. Huzzard v. Trego, 35 Pa. St. 9; Terpening v. Holton, 9 Col. 306; Stewart v. Scott, 57 Ark. 153; Rullman v. Barr, 54 Kan. 643.

3. Fowler v. Moore, 4 Ark. 570.

4. Peirce v. Bank of Tenn., 1 Swan (Tenn.) 265.

5. Kelly v. Riggs, 2 Root (Conn.) 126.

6. Stokes v. Prescott, 4 B. Mon. (Ky.) 37; Forsayth v. Vehmeyer, 55 Ill. App. 223.

7. Williams v. Kerr, 113 N. C. 306; Gore v. Elwell, 22 Me. 442; Thayer v. Stearns, 1 Pick. 109; Stockbridge v. West Stockbridge, 12 Mass. 400; Dillingham v. Snow, 5 Mass. 547; Ravenscroft v. Gibony, 2 Mo. 1; Farmers' Bank v. Gibson, 6 Pa. St. 51; Clark v. Trindle, 52 Pa. St. 492; Brown v. Griffith, 70 Cal. 14.

8. Morrison v. Chapin, 97 Mass. 72; Tanner v. Page, (Mich.) 63 N. W. Rep. 993.

9. Bank of United States v. Sill, 5 Conn. 106; 13 Am. Dec. 44 and note.

10. Mayson v. Beazley, 27 Miss. 106; McCrady v. Jones, 36 S. C. 136.

11. Lacey v. Davis, 4 Mich. 140; 66 Am. Dec. 524; Ross v. Goodwin, 88 Ala. 390.

12. Smith v. Carter, 3 Rand. (Va.) 167; Reeves v. Booth, 2 Mill's Const. (S. C.) 334; 12 Am. Dec. 679 and note.

13. McDonnell v. Ford, 87 Mich. 198.

14. Weatherhead v. Baskerville, 11 How. 329; Stocking v. St. Paul T. Co., 39 Minn. 410; Hanna v. Price, 23 Ala.

826; Gunther v. Bennett, 72 Md. 384; Thompson v. Thompson, 9 Ind. 323; 68 Am. Dec. 638; Lomerson v. Hoffman, 24 N. J. L. 674; Baskin v. Seechrist, 6 Pa. St. 154; Wells v. Pressy, 105 Mo. 164; Wiseman v. North Pacific Ry. Co., 20 Ore. 425; 23 Am. St. Rep. 135 and note.

15, Elmondorff v. Carmichael, 3 Litt. (Ky.) 472; 14 Am. Dec. 86; Shrouders v. Harper, 1 Har. (Del.) 444; Kimball v. Morrell, 4 Me. 386; Atwell v. Lynch, 39 Mo. 519; Jack v. Woods, 29 Pa. St. 375; Goodier v. Lake, 1 Atk. 446; Jackson v. Frier, 16 Johns. 193; Hughes v. Southern Warehouse Co., 94 Ala. 613; Reynolds v. Jourdan, 6 Cal. 108; Calhoun v. Calhoun, 81 Ga. 91; McPherson v. Rathbone, 7 Wend. 216; Stocking v. St. Paul T. Co., 39 Minn. 410; Slone v. Thomas, 12 Pa. St. 209; Gunther v. Bennett, 72 Md. 384; Combs v. Com., (Ky.) 25 S. W. Rep. 590; Stevens v. State, 50 Kan. 712; Wiseman v. North Pacific Ry. Co., 20 Ore. 425; 23 Am. St. Rep. 135 and note.

16, Stockdale v. Young, 3 Strob. (S. C.) 501.

17, Fitch v. Bogue, 19 Conn. 285; Den v. Pond, 1 N. J. L. 379; Culpepper v. Wheeler, 2 McMull. (S. C.) 66; Bonds v. Smith, 106 N. C. 553; Smith v. Brown, 151 Mass. 338.

212. Same — Diligence necessary before secondary evidence is allowed. — It is the general rule that before secondary evidence of a writing alleged to be lost can be given there must be proof that a *diligent search* has been made in the place where it is most likely to be found and that the search has not been successful.¹ When the paper from its nature has some particular place of deposit or is shown by the evidence to have been in some particular place or in the custody of some particular person, that place should be searched in the utmost good faith, or the person in whose custody it is shown

to have been should be produced.² While an honest and diligent search is sufficient, there is no reasonably certain proof of the loss until it appears by their own testimony that it is not in the hands of any of those where it might reasonably be supposed to be.³ The testimony of the *last custodian* of the paper or record should be produced⁴ and, if dead, his representative or successor should be called.⁵ If the paper is so traced that the possession may be in the hands of either of two persons, both should be sworn before secondary evidence will be allowed.⁶ But it is not necessary to call the last custodian with whom a document was left when the office has been searched by another person under the former's direction and the latter has testified.⁷ A reference to some of the adjudicated cases will best illustrate the *degree of diligence* required. Thus no foundation is laid for parol testimony of the contents of a writing by the mere statement of the witness that he had not the paper with him.⁸ Nor is it a sufficient excuse that the party and the attorney had each supposed the other had letters and would bring them to the place of trial, no special search having been made.⁹ Nor is the affidavit of the attorney alone sufficient as it does not exclude the idea that the client might produce the paper.¹⁰ Nor was it sufficient where the cashier of a bank testified that a letter which could not be

be found, was received either by himself or a director, though both had searched.¹¹

1, *Armstrong v. Simmons*, 3 Har. (Del.) 342; *Holbrook v. Trustees*, 28 Ill. 187; *Dickerson v. Talbot*, 14 B. Mon. (Ky.) 60; *Kidder v. Blaisdell*, 45 Me. 461; *Glenn v. Rogers*, 3 Md. 312; *Doe v. McCaleb*, 3 Miss. 756; *Barton v. Murrain*, 27 Mo. 235; 72 Am. Dec. 259; *Jackson v. Root*, 18 Johns. 60; *Jackson v. Betts*, 6 Cow. 377; 9 Cow. 208; *Poignand v. Smith*, 8 Pick. 272; *Parke v. Bird*, 3 Pa. St. 360; *Fletcher v. Jackson*, 23 Vt. 581; 56 Am. Dec. 98; *Howe v. Fleming*, 123 Ind. 262; *Burns v. Chase*, 9 Col. 225; *Foot v. Silliman*, 77 Tex. 268; *Wiseman v. North. Pac. Ry. Co.*, 20 Ore. 425; 23 Am. St. Rep. 135 and note; *McKesson v. Smart*, 108 N. C. 17; *Woods v. Burke*, 67 Mich. 674; *Powell v. Wallace*, 44 Kan. 656; *Niland v. Murphy*, 73 Wis. 326; *Perrin v. State*, 81 Wis. 135; *Com. v. Jeffries*, 7 Allen 548; 83 Am. Dec. 712; *Tanner v. Hall*, 89 Ala. 628; *Coffing v. Carnahan*, 122 Ind. 427; *Shouler v. Bonander*, 80 Mich. 531.

2, *Sturgis v. Hart*, 45 Ill. 103; *R. v. Stourbridge*, 8 Barn. & C. 96; *Minshall v. Lloyd*, 2 M. & W. 450; *McGahy v. Alston*, 2 M. & W. 206; *Fernley v. Worthington*, 1 Man. & G. 491; *Singer Mfg. Co. v. Riley*, 80 Ala. 314; *Jernigan v. State*, 81 Ala. 58; *McCollister v. Yard*, (Iowa) 57 N. W. Rep. 447; *Susquehanna Mut. Fire Ins. Co. v. Mor-dorf*, 152 Pa. St. 22; *Bascom v. Toner*, 5 Ind. App. 229.

3, *Doyle v. Wiley*, 15 Ill. 576; *Patterson v. Keystone Co.*, 30 Cal. 360; *Hemphill v. McClimans*, 24 Pa. St. 367; *Harper v. Hancock*, 6 Ired. (N. C.) 124; *Hammond v. Ludden*, 47 Me. 447.

4, *Judson v. Eslava, Minor* (Ala.) 71; 12 Am. Dec. 32 and note; *Lindberg v. Mackenheuser*, 4 Ill. App. 603; *Darrow v. Pierce*, 91 Mich. 63; *Trimble v. Edwards*, 84 Tex. 497.

5, *Floyd v. Mintrey*, 5 Rich. L. (S. C.) 361; *Gray v. Thomas*, 83 Tex. 246; *Blalick v. Miland*, 87 Ga. 573.

6, *Patterson v. Keystone Co.*, 30 Cal. 360; *Cruise v. Clancy*, 6 Ir. Eq. R. 552; *Richards v. Lewis*, 11 C. B. 1035; *Hall v. Ball*, 3 Man. & G. 242; *R. v. Hinckley*, 32 L. J. (M. C.) 158.

7, *Waggoner v. Alvord*, 81 Tex. 365; *Buchanan v. Wise*, 34 Neb. 695.

8, *Large v. Vandorn*, 14 N. J. Eq. 208.

9, *Simpson v. Dall*, 3 Wall. 460.

10, *Kauffman v. Shellworth*, 64 Tex. 179.

11, *Taunton Bank v. Richardson*, 5 Pick. 436, held that the director should also have been produced as a witness.

§ 213. Same — Further illustrations.—

No foundation is laid for secondary evidence by testimony that a party has sent a paper to a public officer for record.¹ A search for a letter received by a firm, since dissolved, which did not include an inquiry of the principal member of the firm was held insufficient.² The following are further illustrations of proof held insufficient: Testimony that the witness had looked for the paper at home and could not find it;³ that it was "lost or destroyed";⁴ that he had made search and could not find it;⁵ that he had lost a paper or delivered it to his attorney;⁶ that the receiver of letters did not know where they were,⁷ and that the witness supposed the paper to be in a safe, though he had not seen it for several years.⁸ It was so held where the witness testified that he had given a paper containing a dying declaration to a grand jury and that he could find it neither among his own papers nor among those of the grand jury.⁹ The testimony of an attorney who prepared a writ that he had made diligent search and inquiry for it, but could not find

it, and that when he last saw it it was in the hands of the officer was held insufficient.¹⁰ In cases where there is a *presumption that papers* are in a *certain custody* or in a certain office, search must be made there to rebut the presumption,¹¹ for example, at the office of a magistrate, as to papers appertaining to the office.¹² The same rule applies in case of a deed which is presumed to be with the grantee or at the recorder's office.¹³ In some of the cases above cited secondary evidence was rejected because the details of the search were not given. It may be stated generally that the court should be put in possession of the facts *showing the diligence used*, as the general statement that the witness has used diligence does not suffice.¹⁴ Other illustrations of cases where the search has been held insufficient will be found cited in the notes.¹⁵ It will be seen by a comparison of the illustrations given in this and the succeeding section that it would be impossible to prescribe any single rule which would determine in all cases the sufficiency of the proof of the loss. In every case the testimony should show that the party has in good faith *exhausted all the sources of information* and means of discovery which the nature of the case would naturally suggest and which were accessible to him.¹⁶ But the degree of the diligence to be used must largely *depend upon the circumstances* of the case. The inquiry

is of a preliminary nature addressed to the court in each case; and the decision is largely in the *discretion* of the court,¹⁷ and not subject to review unless the decision is based upon an error of law or upon evidence, which as a matter of law, is insufficient to sustain it.¹⁸ There have been instances in which the decisions have gone upon the theory that every doubt as to the existence of the document should be removed before parol evidence should be admitted of its contents. But the true rule undoubtedly is that the loss or destruction of the document need not be proved beyond the possibility of mistake. It is enough if the testimony satisfies the court of the fact with *reasonable certainty*.¹⁹ As stated by a learned writer: "It is not necessary to prove exhaustively that the paper exists nowhere. It is sufficient if the party offering parol proof show such diligence as is usual with good business men under the circumstances."²⁰ And if it is made to appear that there is no direct evidence of the execution or former existence of the document, the fact can be proved presumptively *by circumstances*.²¹ The testimony as to the loss or destruction may be positive and direct, as where a document has been burned in the presence of witnesses. But in most cases the evidence on this issue will be circumstantial in its character. Such testimony is competent and adequate if it raises a

reasonable inference or presumption that the document has been lost.²²

1, *Hawkins v. Rice*, 40 Iowa 435; *McCollister v. Yard*, (Iowa) 57 N. W. Rep. 447. The same is true where the paper is among the probate records, *Fitch v. Randall*, (Mass.) 40 N. E. Rep. 182.

2, *Hill v. Aultman*, 68 Iowa 630.

3, *Crowe v. Capwell*, 47 Iowa 426.

4, *Anglo-American Packing & Provision Co. v. Cannon*, 31 Fed. Rep. 313; *Echols v. Hubbard*, 90 Ala. 309; *Angell v. Loomis*, 9 Mich. 5. But if there is no cross-examination it will be implied that search had been made, *Smith v. Brown*, 151 Mass. 338.

5, *Bartlett v. Wilbur*, 53 Md. 485.

6, *Clement v. Ruckle*, 9 Gill (Md.) 326.

7, *Howe Machine Co. v. Stiles*, 53 Iowa 424.

8, *Post v. School District*, 19 Neb. 135; *Burks v. Bragg*, 89 Ala. 204.

9, *Boulden v. State*, 102 Ala. 78.

10, *Phillips v. Purington*, 15 Me. 425.

11, *Wylie v. Smitherman*, 8 Ired. (N. C.) 236; *Davenport v. Harris*, 27 Ga. 68.

12, *Adams v. Fitzgerald*, 14 Ga. 36.

13, *Stow v. People*, 25 Ill. 81.

14, *Shepard v. Pratt*, 16 Kan. 209; *Booth v. Cook*, 20 Ill. 129.

15, *Wilburn v. State*, 60 Ark. 141; *Burr v. Kase*, 168 Pa. St. 81; *Fox v. Lambson*, 8 N. J. L. 275; *Preslar v. Stallworth*, 37 Ala. 402; *Rankin v. Crow*, 19 Ill. 626; *Doe v. Kind*, 4 Miss. 125; *Viles v. Moulton*, 13 Vt. 510; *Gould v. Trowbridge*, 32 Mo. 291; *Owen v. Paul*, 16 Ala. 130; *Harven v. Hunter*, 8 Ired. (N. C.) 464; *Hanson v. Kelly*, 38 Me. 456; *Bray v. Aiken*, 60 Tex. 688; *Billin v. Henkel*, 9 Col. 394.

16, *Ellis v. Smith*, 10 Ga. 253; *Folsim v. Scott*, 6 Cal. 460; *Wiseman v. Northern Pac. Ry. Co.*, 20 Ore. 425; 23 Am. St. Rep. 135 and note; *Roberts v. Dixon*, 50 Kan. 436.

17, *Doe v. Aiken*, 31 Fed. Rep. 393; *Milford v. Veazie*, (Me.) 14 At. Rep. 730; *Juzan v. Toulmin*, 9 Ala. 662; 44 Am. Dec. 448; *Waller v. School District*, 22 Conn. 306; *Wineton v. Prevost*, 6 La. An. 164; *Witter v. Latham*, 12 Conn. 392; *Vaughn v. Biggers*, 6 Ga. 188; *Schrowders v. Harper*, 1 Har. (Del.) 444; *Poulet v. Johnson*, 25 Ga. 403; *Fisk v. Kissane*, 42 Ill. 87; *Adams v. Leland*, 7 Pick. 62; *Bachelder v. Nutting*, 16 N. H. 261; *Stafford v. Stafford*, 1 N. J. Eq. 525; *Woodworth v. Barker*, 1 Hill 172; *Ben v. Peete*, 2 Rand. (Va.) 539; *Boyle v. Arledge*, 1 Hemp. (U. S.) 620; *Bonds v. Smith*, 106 N. C. 553.

18, *Leak v. Covington*, 99 N. C. 599; *Inhabitants of Milford v. Veazie*, (Me.) 14 At. Rep. 730; *Smith v. Brown*, 151 Mass. 338; *Kearney v. New York*, 92 N. Y. 617; *Mason v. Libbey*, 90 N. Y. 683 and cases cited; *Gorgas v. Hertz*, 150 Pa. St. 538, unless manifestly insufficient; *Bain v. Walsh*, 85 Me. 108, unless there is an apparent abuse of discretion.

19, *United States v. Sutter*, 21 How. 170; *Bartlett v. Smith*, 11 M. & W. 483.

20, 1 Whart. Ev. sec. 142.

21, *Wells v. Jackson Mfg. Co.*, 48 N. H. 491; *Taunton Bank v. Richardson*, 5 Pick. 436; *Central Turnpike v. Valentine*, 10 Pick. 142; *Witler v. Latham*, 12 Conn. 392; *Clark v. Hornbeck*, 17 N. J. Eq. 430; *Blair v. Flack*, 141 N. Y. 53.

22, *Howd v. Breckenridge*, 97 Mich. 65; *Parks v. Dunkle*, 3 Watts & S. (Pa.) 291.

§ 214. **Same—Cases illustrating what is sufficiency of proof.**—A few other instances may be useful to the practitioner as illustrations of what the courts have held to be sufficient proof of loss to admit secondary evidence. Thus, it has been held sufficient if

a paper whose custody belongs to a particular office cannot be found by the witness,¹ or if he testifies that it was left on his table and that he had made diligent search but could not find it.² The burning of a building containing documents or books and the failure after search to find them among the goods saved raises such a presumption of loss as to admit secondary evidence of their contents.³ It was held sufficient to warrant parol proof of a note on trial of an appeal where a justice testified that the note was offered in evidence before him and that he had searched his papers for it diligently without success;⁴ and it was so held where a witness testified that the note in question had been lost either by being picked from his pocket or by being mislaid and that it could not be found.⁵ Where it was shown that unsuccessful search was made in the clerk's office for an execution, that the sheriff who once had possession of it was dead and that his house had been burned, and that the execution could not be found on inquiry of members of the family, secondary evidence of its contents was admitted.⁶ It was so held where the grantee of a deed proved that he had deposited it in the postoffice directed to another, who testified that he had never received it and that inquiry had been made at the office of deposit and of delivery.⁷ Where one wishing to prove the contents of a paper proved that he had tendered it to the defend-

ant who threw it aside and that it was not seen again, it was held that parol evidence could be given of the contents.⁸ Where a witness shows that letters had been mailed by him to a foreign country, and that he had not thereafter seen them; that he received replies in due course of mail, and that he had no copies of the letters, it was held proper to admit secondary evidence thereof.⁹ Other illustrations where proof of loss has been held sufficient will be found in the cases cited in the notes.¹⁰

1, *Braintree v. Battles*, 6 Vt. 395; *Poe v. Dorrah*, 20 Ala. 288; 56 Am. Dec. 196; *Carter v. Edwards*, 16 Ind. 238; *New York, etc. Co. v. Richmond*, 6 Bosw. (N. Y.) 213; *Johnson v. Powell*, 30 Ala. 113; *Daniels v. Creekmore*, 7 Tex. Civ. App. 573. See also, *Williams v. Kerr*, 113 N. C. 306.

2, *Tyler v. Dyer*, 13 Me. 41.

3, *Thayer v. Barney*, 12 Minn. 502; *Daniels v. Creekmore*, 7 Tex. Civ. App. 573; *Burt v. Long*, (Mich.) 64 N. W. Rep. 60.

4, *Conkey v. Post*, 7 Wis. 131.

5, *McMillan v. Bethold*, 35 Ill. 250.

6, *Leland v. Cameron*, 31 N. Y. 115.

7, *McRae v. Pegnes*, 4 Ala. 158. So where it was testified that a certain letter was stamped and addressed and left in a letter box in a store and an employee testified that, if so left, he had mailed it, it was held sufficient proof of mailing to allow secondary evidence of the contents of the letter, *Sanborn v. Cunningham*, (Cal.) 33 Pac. Rep. 894.

8, *Stoddard v. Mix*, 14 Conn. 12.

9, *Zeeterbach v. Allenberg*, 99 Cal. 57.

10, *Edwards v. Edwards*, 11 Rich. L. (S. C.) 537; *Kingswood v. Bethlehem*, 13 N. J. L. 221; *Brown v. Austin*, 41 Vt. 262; *Horseman v. Todhunter*, 12 Iowa 230; *Adams v. Shelby*, 10 Ala. 478; *Bank of United States v. Sill*, 5 Conn. 106; 13 Am. Dec. 44; *Herndon v. Givens*, 16 Ala. 261; *Haywood Plankroad Co. v. Bryan*, 6 Jones (N. C.) 82; *Hunter v. Lanius*, 82 Tex. 677; *Shields v. Byrd*, 15 Ala. 818; *Graff v. Pittsburg Ry. Co.*, 31 Pa. St. 489; *Kelsey v. Hanmer*, 18 Conn. 311; *Hatch v. Carpenter*, 9 Gray 271; *Cochran v. Cochran*, 46 La. An. 536; *Isley v. Boon*, 109 N. C. 555; *Van Bokkelein v. Berdell*, 130 N. Y. 141; *West Philadelphia National Bank v. Field*, 143 Pa. St. 473; *Henry v. Whittaker*, 82 Tex. 5; *Oriental Bank v. Haskins*, 3 Met. 332; 37 Am. Dec. 140 and note; *Wright v. United States*, 158 U. S. 232. So, where a person denied ever having received a certain receipt which was alleged to have been given him, *State v. Davis*, 92 Tenn. 634.

§ 215. **Importance of documents as affecting diligence—Time of search.**—The strictness of the rule requiring search for documents and proof of their loss varies in proportion to the importance and value of the documents. If the document be one of importance, such as is generally carefully preserved, or if there is any reason to suspect that it may be withheld for some improper reason, very *strict proof* may be properly required.¹ But if there is no ground for suspicion as to the existence of the writing or that it is designedly withheld, all that should be required is a reasonably diligent search for the original. If, on the other hand, the document is only of *transitory* interest or little value as, for instance, an envelope, a newspaper or such such private letters as are

not usually preserved very *slight evidence* may suffice, as in such case the loss would be very readily inferred.² So, if no direct issue is made upon the fact, less strictness will be required.³ So after the execution of a deed by the vendor, his title bond is presumed to have been given up and destroyed.⁴ A search for documents is not necessary where, from the nature of the case, it is *evident that it would be unavailing*, as where there is positive proof that the paper had been lost.⁵ The same is true if the paper had never been in the custody or control of the person wishing to give testimony of its contents.⁶ No precise rule can be stated as to the *time* when the search should have been made. Applying the general rule the search should have been made so recently as to satisfy the court that every reasonable effort has been made in good faith to furnish the best evidence. In an English case a search among proper papers three years before the trial was held sufficient.⁷ Though Mr. Taylor cites this case as authority for the proposition that the search need not be recent nor for the purposes of the cause, he adds that it would have been more satisfactory had the papers been again examined.⁸ In a Pennsylvania case it was held that a search made more than a year before the trial was not sufficient for the admission of secondary evidence;⁹ this rule was adhered to in a later case in the same state

where search had not been made for three years.¹⁰

1, Juzan v. Toulmin, 9 Ala. 662; 44 Am. Dec. 448; Waller v. School Dist., 22 Conn. 326; Sexton v. McGill, 2 La. An. 190; Winston v. Prevost, 6 La. An. 164; Beirne v. Rosser, 26 Gratt. (Va.) 537; Wiseman v. Northern Pac. Ry. Co., 20 Ore. 425; 23 Am. St. Rep. 135 and note; Tayl. Ev. sec. 429.

2, Spaulding v. Bank of Susquehanna County, 9 Pa. S. 28; Beirne v. Rosser, 26 Gratt. (Va.) 537; Gathecole v. Miall, 15 M. & W. 319; Brewster v. Sewell, 3 Barn. & Ald. 296; Kensington v. Myles, 8 East 273; R. v. East Farleigh, 6 Dowl. & R. 147; Freeman v. Aikell, 2 Barn. & C. 494; Rhode v. McLean, 101 Ill. 467.

3, Doe v. Aiken, 31 Fed. Rep. 393.

4, Williams v. Mitchell, 30 Ala. 299.

5, Postel v. Palmer, 71 Iowa 157.

6, Wells v. Miller, 37 Ill. 276.

7, Fitz v. Rabbits, 2 Moody & Rob. 60.

8, Tayl. Ev. sec. 435.

9, Porter v. Wilson, 13 Pa. St. 641.

10, Burr v. Kase, 168 Pa. St. 81.

‡ 216. **Mode of proving loss — Hearsay admissions — Affidavit.** — The rule forbidding hearsay testimony precludes the admission of the mere *declarations of third persons* who have had the custody of documents.¹ In such cases the person should be served with a *subpoena duces tecum* or their depositions should in proper cases be taken.² But in England in a few instances such declarations seem to have been received

although clearly hearsay evidence, apparently on the theory that, as the evidence was of a preliminary fact and addressed to the court only, the ordinary rule should be relaxed.³ The *admissions* of a party or of his attorney or agent that a document has been lost is sufficient proof of loss.⁴ Before the adoption of statutes allowing parties to testify in their own behalf it was the common practice for the court to receive the *ex parte affidavit* of the party as evidence on this question,⁵ but the affidavit was not admissible as evidence of any other fact.⁶ In such cases of course the affidavit had to show due diligence in the search and compliance with the other requirements already stated.⁷ Since parties are allowed to testify in their own behalf there would seem no good reason for admitting *ex parte* affidavits as evidence. The party should give his evidence in open court or by deposition as upon other issues.

1, Governor v. Barkley, 4 Hawks (N. C.) 20; Justice v. Luther, 94 N. C. 793; Rex v. Denio, 7 Barn. & C. 620; Walker v. Beauchamp, 6 Car. & P. 552; Masterson v. Jordan, (Tex. Civ. App.) 24 S. W. Rep. 549; Tayl. Ev. sec. 430.

2, Reg. v. Saffron Hill, 22 L. J., (M. C.) 22; 1 El. & B. 93.

3, Tayl. Ev. sec. 430; R. v. Kenilworth, 2 Ses. Cas. 72; 7 Q. B. 642; R. v. Braintree, 28 L. J. (M. C.) 1; Smith v. Smith, Ir. Rep. 10 Eq. 273; Whart. Ev. sec. 150.

4, Stebbins & Duncan, 108 U. S. 32; Indianapolis Ry. Co. v. Jewett, 16 Ind. 273; Cooper v. Maddan, 6 Ala. 431; Rex v. Haworth, 4 Car. & P. 254; Shortz v. Unangst, 3

Watts & S. (Pa.) 45; Mandeville v. Reynolds, 68 N. Y. 528; Diehl v. Emig, 65 Pa. St. 320.

5, Patterson v. Winn, 5 Peters 233; Ward v. Ross, 1 Stew. (Ala.) 136; Skinker v. Flohr, 13 Cal. 638; Porter v. Ferguson, 4 Fla. 102; Smith v. Atwood, 14 Ga. 402; Mitchell v. Shanley, 12 Gray 206; Stevens v. Reed, 37 N. H. 49; Wells v. Martin, 1 Ohio St. 386; Wallace v. Wilcox, 27 Tex. 60; Cleveland v. Worrell, 13 Ind. 545; Beachbord v. Luce, 22 Mo. 168.

6, Mason v. Tallman, 34 Me. 472.

7, Palmer v. Logan, 4 Ill. 56; Carter v. Vaulx, 2 Swan (Tenn.) 639; Mason v. Tallman, 34 Me. 472.

§ 217. Documents beyond the jurisdiction of the court—Destruction of documents, etc.—It frequently becomes necessary to prove the contents of documents which are in the possession of persons in another state. The supreme court of the United States has declared the rule in such cases very broadly as follows: "It is well settled that if books or papers necessary as evidence in a court in one state be in the possession of a person living in another state, secondary evidence without further showing may be given to prove the contents of such papers, and notice to produce them is unnecessary."¹ It has been held, however, in several states that the mere fact that documents are outside the state does not warrant the admission of secondary evidence. These courts hold that effort should be made in such case to obtain the best evidence.² Certainly the safer practice in such cases is to take the *deposition* of

the person having possession of such documents. When a deposition is thus taken, as there is no mode of compelling a non-resident witness to attach the original to his deposition, a copy may be attached and thus becomes competent evidence.³ In such a case secondary evidence as to the contents of a document may be given, if the witness out of the jurisdiction refuses to produce it upon proper notice being given.⁴ If a paper is *accidentally destroyed* by the party and without fault, secondary evidence may be given of its contents.⁵ And even though the destruction of the instrument is *voluntary*, secondary evidence of its contents may be given, if the circumstances accompanying the act are consistent with an honest purpose or show some mistake or misapprehension.⁶ But in such cases every inference of fraud must be overcome.⁷ Secondary evidence may be given as to the contents of a document in the possession of a *stranger* or third party, if the legal remedies for its production have been exhausted and have proved unavailing. This has been illustrated in cases where attorneys refused after service of a subpoena *duces tecum* to produce documents belonging to their clients which they had the right to withhold;⁸ and also where a witness refuses to produce a document on the ground that it may criminate him.⁹

1, *Burton v. Driggs*, 20 Wall. 134; *Mattocks v. Stearns*, 9 Vt. 326; *Smith v. Traders' Nat. Bank*, 82 Tex. 368; *First Nat. Bank v. Willis*, 82 Tex. 141; *Bonner v. Home Ins. Co.*, 13 Wis. 677; *Elwell v. Mersick*, 50 Conn. 272; *Tucker v. Woolsey*, 6 Lans. (N. Y.) 482; *Beattie v. Hilliard*, 55 N. H. 428; *Fosdick v. Van Horn*, 40 Ohio St. 459; *Ware v. Morgan*, 67 Ala. 461; *Rhodes v. Seibert*, 2 Pa. St. 18; *Memphis & C. Ry. Co. v. Hembree*, 84 Ala. 182; *Miles v. Stevens*, 142 Mass. 571; *Bowden v. Achor*, (Ga.) 22 S. E. Rep. 254.

2, *Floyd v. Mintrey*, 5 Rich. L. (S. C.) 361; *Wood v. Cullen*, 13 Minn. 394; *Deaver v. Rice*, 2 Ired. (N. C.) 280; *McGregor v. Montgomery*, 4 Pa. St. 237; *Shaw v. Mason*, 10 Kan. 184; *Forrest v. Forrest*, 6 Duer 104; *Justice v. Luther*, 94 N. C. 793; *Knowlton v. Knowlton*, 84 Me. 283; *Kirchner v. Laughlin*, (N. M.) 28 Pac. Rep. 505; *Wiseman v. Northern Pac. Ry. Co.*, 20 Ore. 425; 23 Am. St. Rep. 135 and note. This is especially true where the documents in question are in the possession of the party seeking to introduce the secondary evidence, *Mandel v. Swan Land & C. Co.*, 154 Ill. 177.

3, *Amherst Bank v. Conkey*, 4 Met. 459; *Tenn. & C. Ry. Co. v. Danforth*, 99 Ala. 331; *Binney v. Russell*, 109 Mass. 55; *Bailey v. Johnson*, 9 Cow. 115; *Kearney v. Mayor*, 92 N. C. 617.

4, *Thompson-Houston Elect. Co. v. Palmer*, 52 Minn. 174.

5, *Riggs v. Tayloe*, 9 Wheat. 483; *Tobin v. Shaw*, 45 Me. 331; 71 Am. Dec. 547; *Stoddard v. Mix*, 14 Conn. 12; *Sturtevant v. Robinson*, 18 Pick. 175; *Orne v. Cook*, 31 Ill. 238; *Adams v. Guill*, 30 Miss. 397; *Bagley v. McMickle*, 9 Cal. 430; *People v. Dennis*, 4 Mich. 609; 69 Am. Dec. 338; *Baldwin v. Threlkeld*, 8 Ind. App. 312, rejected where the destruction is voluntary.

6, *Tobin v. Shaw*, 45 Me. 331; 71 Am. Dec. 547; *Rudolph v. Lane*, 57 Ind. 115; *Rodgers v. Crook*, 97 Ala. 722.

7, *Blake v. Fash*, 44 Ill. 302; *Joannes v. Bennett*, 5 Allen 169; 81 Am. Dec. 738 and note; *Steele v. Lord*, 70 N. Y. 280; 26 Am. Rep. 602; *Bagley v. McMickle*, 9 Cal. 430; *Jones v. Knaus*, 31 N. J. Eq. 609.

8, *People v. Benjamin*, 9 How. Pr. (N. Y.) 419; *Baum v. Sauer*, 117 Mo. 460; *Kemp v. King*, 2 Moody & Rob. 437; *Reg. v. Hankins*, 2 Car. & K. 823.

9, *State v. Gurnee*, 14 Kan. 111.

§ 218. Effect of notice to produce.—

One of the well recognized excuses for the non-production of primary evidence is that the document is in the possession or power of the adversary and that he has not produced it after due notice to do so.¹ It is very clear that the mere fact that the document is in the hands of the opposite party does not warrant the admission of copies or of other secondary evidence. It must also be shown that the one offering the secondary evidence has done all in his power to secure the best evidence by giving the adversary *notice to produce* the document desired. Thus, in an action against the selectmen of a town for refusing the vote of an inhabitant, parol evidence that the plaintiff's name was on the voting list was refused, there being no notice to produce the list.² So it was held that an extract of a lost letter could not be given in evidence without calling upon the writer of the letter to produce his letter book.³ This rule has been applied generally in the case of letters,⁴ telegrams,⁵ contracts,⁶ powers of attorney,⁷ receipts,⁸ wills,⁹ demands,¹⁰ proofs of loss of insurance,¹¹ corporate records,¹² deeds and other instruments;¹³ and it is hardly necessary to give numerous illustrations,

as the principle is impliedly recognized in many of the cases cited in this chapter. Although it is necessary to show that the document in question is in the custody or under the *control of the party* who is called on to produce it, very *slight evidence* of this fact will suffice if it appears that the document belongs to him, or in the usual course of business ought to be under his control,¹⁴ or if the document was last seen in his possession.¹⁵ Presumptively the document is in the possession of the one to whom it belongs.¹⁶ Thus, the grantee is presumed to have the custody of his deed,¹⁷ but not necessarily of prior title deeds.¹⁸ In an Ohio case it was held to be doubtful whether the mere fact that a letter had been deposited in a post office directed to a particular person would be sufficient to admit secondary evidence after notice to produce.¹⁹ The document is *presumed to continue* in the possession of a party after notice to produce, unless he apprizes the opposite party of the change of possession so that proper steps may be taken for the production.²⁰

1, *Morse v. Woodworth*, 155 Mass. 233; *Grimes v. Fall*, 15 Cal. 63; *Richards v. Richards*, 37 Pa. St. 228.

2, *Harris v. Whitcomb*, 4 Gray 433.

3, *Dennis v. Barber*, 6 Serg. & R. (Pa.) 420.

4, *Foster v. Newbrough*, 58 N. Y. 481; *Oberman Co. v. Adams*, 35 Ill. App. 540; *Mortlock v. Williams*, 76 Mich. 568; *Burlington Co. v. Whitebreast Coal Co.*, 66 Iowa 292; *Phillips v. Scott*, 43 Mo. 86; *Home Protection v. Whidden*,

(Ala.) 15 So. Rep. 567; *Hunter v. Lanius*, 82 Tex. 677; *Dunbar v. United States*, 156 U. S. 185.

5, *DeGellert v. Poole*, 2 N. Y. S. 651.

6, *Dupey v. Ashley*, 2 A. K. Marsh. (Ky.) 11; *Roberts v. Dixon*, 50 Kan. 436.

7, *Rusk v. Sowerwine*, 3 Harr. & J. (Md.) 97.

8, *Ledbetter v. Morris*, 1 Jones (N. C.) 545.

9, *Murchison v. McLeod*, 2 Jones (N. C.) 239.

10, *Muller v. Hoyt*, 14 Tex. 49.

11, *Hanover Ins. Co. v. Lewis*, 23 Fla. 193.

12, *Narragansett Bank v. Atlantic Silk Co.*, 3 Met. 282.

13, *Gist v. McJunkin*, 2 Rich. L. (S. C.) 154; *Newsom v. Davis*, 20 Tex. 419; *Com. v. Emery*, 2 Gray 80.

14, *Henry v. Leigh*, 3 Camp. 502; *Robb v. Starkey*, 2 Car. & K. 143; *Rose v. Winnsboro Nat. Bank*, 41 S. C. 191; *Whart. Ev. sec. 154*; *Tayl. Ev. sec. 440*; *Greenl. Ev. sec. 560* and note.

15, *Rex v. Thistlewood*, 33 How. St. Tr. 757; *Harvey v. Mitchell*, 2 Moody & Rob. 366; *Smith v. Sleaf*, 1 Car. & K. 48.

16, *Rex v. Stoke Golding*, 1 Barn. & Ald. 173.

17, *Lord Buckhurst's Case*, 1 Coke Rep. 1; *Cooke v. Hunter*, 2 Overt. (Tenn.) 113; *Nicholson v. Hilliard*, 1 N. C. 253; *Jackson v. Woolsey*, 11 Johns. 446; *Florence Co. v. Warren*, 91 Ala. 533; 4 Phil. Ev. note 225.

18, See authorities last cited.

19, *Choteau v. Raitt*, 20 Ohio 132. See also, *Vancil v. Hagler*, 27 Kan. 407.

20, *Jackson v. Shearman*, 6 Johns. 19.

§ 219. Object of notice to produce—
Time of giving.—The object of the notice to produce papers at the trial is to give the

adverse party due notice to produce the best evidence where it is in his possession so that he may have the benefit of it if he desires and cannot claim to be surprised and, in default of its production, to allow the party giving the notice to offer secondary evidence.¹ A party is generally under no obligation to produce a paper needed by his adversary, unless full notice has been given to produce the same for use at the trial.² Some of the English authorities for a time maintained that the object of the notice to produce was not only to enable the adverse party to have the document in court, but to enable him to prepare evidence to explain, weaken or confirm it.³ But the rule now obtains in England that the sole *object of the notice is to obtain the document for use as evidence* and in case of its non-production *to admit secondary evidence*.⁴ It was accordingly held in the case which settled this rule that where the party or his attorney had the document in court, it might be called for without previous notice and that, if not produced, secondary evidence might be given.⁵ The same rule prevails in this country and if the document is proved to be in court⁶ or easy of access, *notice given at the trial is sufficient*;⁷ and the attorney or party may be compelled to state whether he has the document in court.⁸ That the document is in court may sometimes be presumed from its nature and its connection with the case, but

of course this presumption may be rebutted by the oath of the attorney or party.⁹ It is impossible to lay down any precise rule as to the requisite *length of time* of notice in those cases where notice to produce is necessary. It is a subject which rests very largely in the sound discretion of the court;¹⁰ and in the exercise of such discretion the court should determine whether under all the circumstances of the case the notice has been reasonable and such as could have been complied with.¹¹ A notice given the evening before the trial where the residence of the party was near the place of trial was held sufficient.¹² Under the circumstances of the case it was held that a notice of several days was good though the plaintiff resided out of the state.¹³

1, Reid v. Colcock, 1 Nott & McC. (S. C.) 529; 9 Am. Dec. 729; Field v. Zamonska, 9 Bradw. (Ill.) 479. Copies or parol evidence may be offered after reasonable notice to produce, if it is not complied with, Augur Steel Co. v. Whittier, 117 Mass. 451; Com. v. Goldstein, 114 Mass. 272.

2, Waring v. Warren, 1 Johns. 340.

3, Cook v. Hearn, 1 Moody & Rob. 201; Roe v. Harvey, 4 Burr. 2482.

4, Dwyer, v. Collins, 7 Exch. 639.

5, Dwyer v. Collins, 7 Exch. 639.

6, Brown v. Isbell, 11 Ala. 1009; McPherson v. Rathbone, 7 Wend. 216; Danar v. Boyd, 2 J. J. Marsh. (Ky.) 587; Griffin v. Sheffield, 38 Miss. 359; 77 Am. Dec. 646; Choteau v. Raitt, 20 Ohio 132. That the document is in court may be inferred from the conduct of the attorney or party, Barker v. Barker, 14 Wis. 131.

7, *Atwell v. Miller*, 6 Md. 10; 61 Am. Dec. 294; *Board of Justices v. Fennimore*, 1 N. J. L. 242; *Hammond v. Hopping*, 13 Wend. 505; *Morrison v. Whiteside*, 17 Md. 452; 79 Am. Dec. 661. But not if the document is in another state, *Dade v. Etna Ins. Co.*, 54 Minn. 336.

8, *Brandt v. Klein*, 17 Johns. 335.

9, *Hammond v. Hopping*, 13 Wend. 505.

10, *Bourne v. Buffington*, 125 Mass. 481; *Cummings v. McKinney*, 5 Ill. 57; *Utica Ins. Co. v. Caldwell*, 3 Wend. 296; *Gorham v. Gale*, 7 Cow. 739; 17 Am. Dec. 549; *McPherson v. Rathbone*, 7 Wend. 216; *Barlow v. Kane*, 17 Wis. 38; 84 Am. Dec. 728.

11, See cases last cited.

12, *Shreve v. Dulany*, 1 Cranch C. C. 499.

13, *Jefford v. Ringgold*, 6 Ala. 544. See also, *Mortlock v. Williams*, 76 Mich. 568.

§ 220. Illustrations of sufficient notice.—Where the notice was given the day before the trial, and the paper was in the possession of a person eighty miles distant, the court declined to assume that the paper could not be produced and held secondary evidence improper.¹ In another case when the notice was after the term commenced, and four days previous to the trial, and the residence of the party served was twelve miles away, the notice was held sufficient.² In an English case it was held that the notice was sufficient although the cause was partly tried, it appearing that there was still time for the production of the document.³ In New York it is held that when the document is easy of access, a notice after the trial has commenced

is sufficient; but that after the term has commenced the party is not bound to leave court or business and go or send for documents unless there is a reasonable time before the case may be tried.⁴ And in Ohio it was held that, although under peculiar circumstances a notice at the trial might be reasonable, as a general rule a notice given during the progress of the trial would be unreasonable.⁵ A two days notice upon a solicitor was held good, although his client had gone abroad. The court presumed that the solicitor in charge of the case had the papers which were material.⁶ So a short notice was held good for the production of letters written in England to a partner in New South Wales, where from long litigation it might be presumed that the letters had been returned to England.⁷ It will be seen from the cases cited that a very liberal rule prevails; and yet these authorities support the general rule that the notice should be served in time to give reasonable opportunity to produce the paper.⁸

1, *Cody v. Hough*, 20 Ill. 43; *Jackson v. Marsh*, 1 Caines (N. Y.) 153, notice of nine days where the paper was one hundred and eighty miles away held sufficient.

2, *Hammond v. Hopping*, 13 Wend. 505.

3, *Sturm v. Jeffree*, 2 Car. & K. 442.

4, *Utica Ins. Co. v. Caldwell*, 3 Wend. 296. In another case notice at the trial was held sufficient where there had been a verbal notice to produce at the hearing before the referee and where the materiality of the document was clear and each party was presumed to have present the papers bearing on the case, *Kerr v. McGuire*, 28 N. Y. 446.

5, Choteau v. Raitt, 20 Ohio 132.

6, Bryan v. Wagstaff, Ryan & M. 327; 2 Car. & P. 125.

7, Sturge v. Buchanan, 10 Adol. & Ell. 598.

8, Atkinson v. Carter. 2 Chit. 403; Bevan v. Waters, 1 Moody & M. 235; Sims v. Kitchen, 5 Esp. 46; Houseman v. Roberts, 5 Car. & P. 394; McDonald v. Carson, 95 N. C. 377; Lawrence v. Clark, 14 M. & W. 250; Pitt v. Emmons, 92 Mich. 542; DeWitt v. Prescott, 51 Mich. 298; Byrnes v. Harvey, 2 Moody & Rob. 89; Bushnell v. Bishop Hill Colony, 28 Ill. 204; Mortlock v. Williams, 76 Mich. 568; Julius King Co. v. Treat, 72 Mich. 599.

‡ 221. **Requisites of notice.**—The notice to produce need not be repeated at each succeeding term, if there are several trials. In such case or if the trial is postponed several terms, *a single notice is sufficient.*¹ And a notice to produce at the trial given in a justice's court is operative in the superior court on appeal.² A notice to a party to produce a paper in his possession is sufficient to authorize the admission of parol evidence, if the notice is so framed that there can be no reasonable doubt as to what papers are meant.³ *Mistakes* which do not actually tend to mislead do not vitiate the notice; for example, when an alleged copy of an instrument attached to the notice to produce was inaccurate,⁴ and where the notice was entitled in the wrong court, it was held sufficient.⁵ In several English cases it has been held not necessary to specify the exact documents required, but that it is sufficient if the notice is so framed that the party served may rea-

sonably believe that a certain document is required. Thus, general notices calling for all letters written to the party relating to the matters in dispute or for letters received by the plaintiff from the defendant within certain specified dates have been held sufficient.⁶ In an early case notice to produce "all letters, papers and documents touching or concerning the bill of exchange" sued on was held too general.⁷ In England, prior to the adoption of rules of court requiring the notice to be in writing, it might be either *written or parol*.⁸ Doubtless the better practice is to serve a written notice, but, in the absence of a statute or rules of court, it is believed that verbal notice, if timely and explicit, would be sufficient.

1, *State v. Kimbrough*, 2 Dev. (N. C.) 431; *Jackson v. Shearman*, 6 Johns. 19; *Patten v. Goldsborough*, 9 Serg. & R. (Pa.) 47; *Rawson v. Knight*, 73 Me. 340; *Battaglin v. Thomas*, 5 Tex. Civ. App. 563.

2, *Wilson v. Gale*, 4 Wend. 623; *Reab v. Moore*, 19 Johns. 337.

3, *Bemis v. Charles*, 1 Met. 440; *Walden v. Davison*, 11 Wend. 65; 25 Am. Dec. 602.

4, *Bogart v. Brown*, 5 Pick. 18; *Justice v. Elstob*, 1 Fost. & F. 256.

5, *Lawrence v. Clark*, 14 M. & W. 250.

6, *Rogers v. Custance*, 2 Moody & Rob. 179; *Jacobs v. Lee*, 2 Moody & Rob. 33; *Conybeare v. Farries*, L. R. 5 Exch. 16; *Morris v. Hauser*, 2 Moody & Rob. 392. See also, *Jones v. Parker*, 20 N. H. 31. But see, *Walden v. Davison*, 11 Wend. 65; 25 Am. Dec. 602; *Arnsteine v. Treat*, 71 Mich. 561.

7, *France v. Lucy, Ryan & M.* 341; *Jones v. Edwards*, 1 *McClel. & Y.* 139. See also, *Parish v. Weed Machine Co.*, 79 *Ga.* 682, where an adjournment was allowed because the notice was too vague.

8, *Smith v. Young*, 1 *Camp.* 439; 4 *Phil. Ev.* p. 411, note 224.

§ 222. **Notice to produce — On whom served.** — The notice to produce may be directed to and served on the party or on his attorney.¹ Notice on the attorney has been held good, although he was only the attorney for the nominal plaintiff, and the suit was being prosecuted for the benefit of another party.² And the notice on a solicitor remains good, although a change is subsequently made and another solicitor takes his place.³ In order, however, to admit secondary evidence there must be some proof that the party on whom the notice was served had *control of the instrument* in question. But presumptive proof is sufficient.⁴ It has been held immaterial that the document may be in the possession of some third person, provided it may be deemed within the control of the party. Thus, in an early case it was held that in an action against the owner of a vessel, service on him was sufficient, though the document was in the possession of the captain.⁵ On the same principle notice to the party to produce a check drawn by him and in possession of his banker is sufficient.⁶ So the possession of an attorney

is deemed the possession of the client.⁷ Where the document was last seen in the hands of the party in interest, though he was not a party to the record, notice served on him was held good.⁸ Notice to the attorney of record of a corporation to produce its records is sufficient.⁹ But where the possession is in some *third person* the fact of privity between him and the party, in other words that the document is within the control of the party, must clearly appear. If it does not so appear, the person in possession of the document should be served with a subpoena *duces tecum*.¹⁰ If the party notified to produce the document proves that it is *lawfully out of his possession*, it is for the judge to determine whether secondary evidence can be given of its contents.¹¹

1, Rogers v. Custance, 2 Moody & Rob. 179; Den v. M'Allister, 7 N. J. L. 46; Lagow v. Patterson, 1 Blackf. (Ind.) 327.

2, Brown v. Littlefield, 7 Wend. 454; Lagow v. Patterson, 1 Blackf. (Ind.) 327.

3, Doe v. Martin, 1 Moody & Rob. 242.

4, Norton v. Heywood, 20 Me. 359; Birkbeck v. Tucker, 2 Hall (N. Y.) 121, declarations of a third party not enough; Lovejoy v. Howe, 55 Minn. 353.

5, Birkbeck v. Tucker, 2 Hall (N. Y.) 121.

6, Partridge v. Coates, Russ. & M. 153; Burton v. Payne, 2 Car. & P. 520; Sinclair v. Stevenson, 1 Car. & P. 582.

7, Rex v. Hunter, 4 Car. & P. 128.

8, Norton v. Heywood, 20 Me. 359.

9, *Thayer v. Middlesex Mut. Fire Ins. Co.*, 10 Pick. 326. Other cases illustrating the rule, *Baldney v. Ritchie*, 1 Stark. 338; *Suter v. Burrell*, 2 Hurl. & N. 867; *Rush v. Peacock*, 2 Moody & Rob. 162.

10, *Birkbeck v. Tucker*, 2 Hall (N. Y.) 121; *Evans v. Sweet*, Ryan & M. 83; *Whitford v. Tutin*, 10 Bing. 395.

11, *Harvey v. Mitchell*, 2 Moody & Rob. 366.

§ 223. **Effect of non-production.**—After the neglect or refusal of the party notified to produce the primary evidence, secondary evidence can be given.¹ As has been already stated, in such cases every reasonable intentment will be in favor of the secondary evidence, if it is vague or uncertain. And it is then too late for the party having possession of the primary evidence to use it in rebuttal or to meet the secondary evidence of the other party with like evidence.² When the paper is produced, it is, of course, the best evidence, and an alleged copy cannot be received as evidence in the first instance on the part of him who has called for the original, although after the introduction of the original as evidence, it might be shown to be defective or to have been tampered with.³

1, *Dunbar v. United States*, 156 U. S. 185. This is also illustrated by most of the cases cited on the general subject under discussion. See sec. 17 *supra*.

2, *Thompson v. Hodgdon*, 12 Adol. & Ell. 135; *Doon v. Donahue*, 113 Mass. 151; *Cahen v. Life Ins. Co.*, 69 N. Y. 300; *Platt v. Platt*, 58 N. Y. 646. It has been held, however, that the contumacy of the party in not producing the document is no ground for rejecting his evidence and no

ground of estoppel, especially since he may be compelled by subpoena *duces tecum* to produce such paper, *Molton v. Mason*, 21 Mich. 364.

3, *Stitt v. Huidekopers*, 17 Wall. 384.

§ 224. When notice to produce is not necessary.—The general rule that notice to produce must be given before secondary evidence can be received of the contents of a paper in the possession of the adverse party does not apply in those cases where the *nature of the proceeding is such as to notify the party* that he is charged with the possession of the instrument and that its production is necessary. Thus, in an action of trover for a written instrument,¹ and on the trial of an indictment for stealing bank notes² or for stealing or forging promissory notes,³ no notice to produce such instruments is necessary. It was so held in an action to recover the amount of a forged bank note which had been returned to the defendant.⁴ In the following cases the courts have held it unnecessary to give such notice: In an action against a carrier for the non-delivery of a writing;⁵ in an action against a telegraph company for failing to deliver a telegram,⁶ and in one against a constable for neglecting to return an execution.⁷ So the rule is the same where the writing is a proper matter of defense and the adverse party must understand that it will come in question,⁸ or where the action is brought on a written contract in the possession of defendant which

is fully described in the complaint.⁹ But in an English case it was held that on a charge of forgery the notice should be given.¹⁰ But clearly it is not necessary where it would be unavailing, as where the forged instrument had been swallowed by the prisoner.¹¹ On a charge of arson to defraud an insurance company notice to produce the policy should be given.¹² It is not necessary to give notice to produce, *if the adverse party has wrongfully or fraudulently obtained possession of the document*. For example, where a lease which has once been used in evidence in the litigation was sent out of the state by the counsel of the party against whom it was used without the consent of the other party,¹³ or when it appears that the adverse party has obtained possession of the original from a person subpoenaed to produce it,¹⁴ or if the document was obtained by the adverse party from the one seeking to use it by fraudulent or forcible means of any character,¹⁵ it is not necessary to give notice to produce the writing. In case the adverse party has introduced a letter, such notice is not necessary before secondary evidence can be introduced to show that such letter is not a part of the communications leading up to the contract.¹⁶

1, Hayes v. Riddle, 1 Sandf. (N. Y.) 248; How v. Hall, 14 East 274; Colling v. Trewick, 6 Barn. & C. 394; Wilson v. Gale, 4 Wend. 623; Hotchkiss v. Mosher, 48 N. Y. 478; Rose v. Lewis, 10 Mich. 483. So in assumpsit for non-delivery of papers, Jolley v. Taylor, 1 Camp. 143.

2, *McGinnis v. State*, 24 Ind. 500; *Com. v. Messinger*, 1 Binn. (Pa.) 273; 2 Am. Dec. 441.

3, *Aickle's Case*, 1 Leach Cr. C. 330; *Butler's Case*, 13 How. St. Tr. 1254; *Spragge's Case*, 14 East 276.

4, *Tuckett v. Clark*, Litt. Sel. Cas. (Ky.) 178; *Bruce v. Ross*, 1 Day (Conn.) 100.

5, *Jolley v. Taylor*, 1 Camp. 143.

6, *Reliance Lumber Co. v. Western Union Tel. Co.*, 58 Tex. 394; 44 Am. Rep. 620. Contra, *Western Union Tel. Co. v. Hopkins*, 49 Ind. 227.

7, *Wilson v. Gale*, 4 Wend. 623.

8, *Kellar v. Savage*, 20 Me. 199; *Brown v. Com.*, 63 N. C. 514.

9, *Dana v. Conant*, 30 Vt. 246.

10, *R. v. Haworth*, 4 Car. & P. 254. See also, *Armitage v. State*, 13 Ind. 441.

11, *Hall v. Howd*, 14 East 176; *Com. v. Pendleton*, 1 Leigh (Va.) 694; 26 Am. Dec. 342; *State v. Potts*, 9 N. J. L. 26; 17 Am. Dec. 449.

12, *R. v. Ellicombe*, 5 Car. & P. 522; *R. v. Kitson*, 22 L. J. (M. C.) 118.

13, *Mitchell v. Jacobs*, 17 Ill. 235.

14, *Leeds v. Cook*, 4 Esp. 256; *Bonesteel v. Lynde*, 8 How. Pr. (N. Y.) 226; *Scott v. Pentz*, 5 Sandf. (N. Y.) 572.

15, *Gray v. Kernaham*, 2 Mill's Const. (S. C.) 65; *State v. Mayberry*, 48 Me. 218; *Neally v. Greenough*, 25 N. H. 325; *Hamilton v. Rice*, 15 Tex. 382; *Garlock v. Geortner*, 7 Wend. 198.

16, *Robinson v. Cutter*, (Mass.) 40 N. E. Rep. 112.

§ 225. **Same, continued.**—No notice to produce a document is necessary where the *paper* to be produced is *itself a notice*.¹ This rule has been applied to notices to quit,² to

the filing of interrogatories for taking out a commission,³ to a notice to an indorser,⁴ notices of action and of demands,⁵ notices of dishonor provided the action be brought upon the bill, but not otherwise,⁶ notice of request to repair fences⁷ and notices generally served in the progress of a cause.⁸ This rule dispensing with notices to produce papers that are mere notices has been given very wide application. "For if it were otherwise, the notice to produce the original could be proved only in the same way as the original itself; and thus a fresh necessity would be constantly arising *ad infinitum*, so that the party would be at every step receding instead of advancing."⁹ In England there has been some conflict on this question; some decisions holding that where notices form part of the cause of action they cannot be proved by parol except after notice to produce.¹⁰ But the weight of authority seems to be in favor of the rule first stated. In the United States there have been also a few cases dissenting from the general doctrine.¹¹ No notice to produce is necessary, if the adversary has *admitted the loss of the paper* or its loss is otherwise proved, as the notice would be useless.¹² Nor is it necessary if the adverse party testifies that *he never had possession of the document*,¹³ nor if he has voluntarily offered to produce it, nor if he has admitted that he destroyed it;¹⁴ nor does the rule apply where the writing is a

mere memorandum of figures or calculation of amounts.¹⁵ But if it is sought to give secondary evidence of a document which has been traced to the adverse party on the ground that it has been destroyed, the usual notice should be given to meet the contingency that the destruction may be disputed.¹⁶

1, Atwell v. Grant, 11 Md. 101; Central Bank v. Allen, 16 Me. 41; Faribault v. Ely, 2 Dev. (N. C.) 67; Eagle Bank v. Chapin, 3 Pick. 180; Falkner v. Beers, 2 Doug. (Mich.) 117; Christy v. Horn, 24 Mo. 242; Leavitt v. Simes, 3 N. H. 14; Morrow v. Com., 48 Pa. St. 305; Quinley v. Atkins, 9 Gray 370; Gethin v. Walker, 59 Cal. 502; Rose v. Lewis, 10 Mich. 483.

2, Eisenhart v. Slaymaker, 14 Serg. & R. (Pa.) 153.

3, Quinley v. Atkins, 9 Gray 370.

4, Eagle Bank v. Chapin, 3 Pick. 180.

5, Jory v. Orchard, 2 Bos. & P. 39.

6, Swain v. Lewis, 2 Crompt., M. & R. 261; Kine v. Beaumont, 3 Brod. & B. 288; Tayl. Ev. sec. 450.

7, Willoughby v. Carleton, 9 Johns. 136.

8, M'Fadden v. Kingsbury, 11 Wend. 667.

9, Eisenhart v. Slaymaker, 14 Serg. & R. (Pa.) 153.

10, Grove v. Ware, 2 Stark. 174; Langdon v. Hulls, 5 Esp. 156; Shaw v. Markham, Peake 165; Lanauze v. Palmer, Moody & M. 31; 4 Phil. Ev. p. 432, note 239.

11, M'Fadden v. Kingsbury, 11 Wend. 667; Faribault v. Ely, 2 Dev. (N. C.) 67.

12, Rex v. Haworth, 4 Car. & P. 254; Foster v. Pointer, 9 Car. & P. 718; How v. Hall, 14 East 276; McCreary v. Hood, 5 Blackf. (Ind.) 316; McAulay v. Earnhart, 1 Jones (N. C.) 502.

13, Foster v. Pointer, 9 Car. & P. 718; How v. Hall, 14 East 276; Continental Ins. Co. v. Chew, (Ind. App.) 38 N. E. Rep. 417; Dunbar v. United States, 156 U. S. 185.

14, *Dwinell v. Larrabee*, 38 Me. 464; *Baldwin v. Threlkeld*, 8 Ind. App. 312.

15, *Weaver v. Crocker*, 49 Ill. 461; *Fuller v. Hoyt*, 14 Tex. 49.

16, *Doe ex dem. Phillips v. Morris*, 3 Adol. & Ell. 46.

§ 226. Duplicates — Recorded deeds.— Since duplicates are primary evidence, it is clear that one may be offered in evidence without notice to produce the other.¹ Where a paper was made in duplicate and one of the originals is shown to be lost and the other in the rightful possession of a person on trial for an offense, sufficient foundation is laid for secondary evidence, as there is no power in the court to compel the accused to produce the paper as evidence against himself.² An exception to the general rule has also been declared in the case of *recorded deeds*, properly executed, when certified copies are offered in evidence.³

1, *Totten v. Bucy*, 57 Md. 446; *Waterman v. Davis*, 65 Vt. 83.

2, *State v. Gurnee*, 14 Kan. 111.

3, *Barton v. Murrain*, 27 Mo. 235; 72 Am. Dec. 259 and note; *Harvey v. Thorpe*, 28 Ala. 250; 65 Am. Dec. 344; *Beverly v. Burke*, 9 Ga. 440; 54 Am. Dec. 351; *Bowman v. Wettig*, 39 Ill. 416; *Avery v. Adams*, 69 Mo. 603; *Fuller v. Ashford*, 133 U. S. 610; *Lasatere v. Van Hook*, 17 Tex. 650. See also, *Seechrist v. Baskin*, 7 Watts & S. (Pa.) 403; 42 Am. Dec. 251 and note; *Rushin v. Shields*, 11 Ga. 636; 56 Am. Dec. 436 and note.

§227. **Effect of the production of papers upon notice.**—When a paper is produced by the adverse party on notice *it does not thereby become evidence*, for it may not be material or competent, and does not become evidence unless, from its character, it is entitled to be so treated.¹ Moreover the party who has called for the document may waive offering it as evidence.² But he cannot so waive the introduction of the writing and give secondary evidence of its contents.³ As a general rule the *document must be proved* like any other instrument. But if a party to a suit in pursuance of a notice produces an instrument to which he is party and under which he *claims a beneficial estate*, it is not necessary for the other party to call any attesting witness. In such cases the custody of the paper affords high presumptive evidence that it is held as a muniment of title and is *prima facie* sufficient proof of execution.⁴ There is a rule relating to the inspection of documents produced on notice which has been stated in numerous cases to the effect that though the party calling for the document may waive it, yet when he inspects the document produced pursuant to the notice and becomes acquainted with its contents, the instrument becomes *evidence for both parties*; and the party who produces the paper has the right to insist on its being read. It is urged that any other rule would give one party an

unfair advantage over the other. He would have the privilege of looking into the private documents of the other party without any corresponding obligation or risk.⁵ This rule has been vigorously attacked in a New Hampshire case which comments at some length upon the English cases claiming that they do not, when scrutinized, support the rule; and that the *dicta* of the English cases have been followed in the United States without careful consideration. The same rule is accepted by the courts of several of the states.⁶ It is urged by this line of authorities that the notice to produce a paper and calling for its inspection ought to be considered as analogous to a bill of discovery, where the answer is not evidence except for the adverse party. It is further urged with much force that a party who has in his possession books or papers which may be material to the case of his opponent has no moral right to conceal them; and that the party calling for the inspection of books and papers would be subjected to undue hazard if an inspection merely would make them evidence in the case, and further that such a rule would tend to the suppression rather than the discovery of the truth.

1, *Penobscot Boom Cor. v. Lamson*, 16 Me. 224; 33 Am. Dec. 656; *Austin v. Thompson*, 45 N. H. 113; *Hylton v. Brown*, 1 Wash. C. C. 343.

2, *Blight v. Ashley*, Peters C. C. 15; *Kenny v. Clarkson*, 1 Johns. 385; *Morrison v. Whiteside*, 17 Md. 452; 79 Am. Dec. 661.

3, *Stitt v. Huidekopers*, 17 Wall. 384. See also, *Gilmore v. Whitcher*, 6 Allen 113.

4, *Herring v. Rogers*, 30 Ga. 615; *Betts v. Badger*, 12 Johns. 223; 7 Am. Dec. 309; *Jackson v. Kingsley*, 17 Johns. 158.

5, *Calvert v. Flower*, 7 Car. & P. 386; *Clark v. Fletcher*, 1 Allen 53; *Reed v. Anderson*, 12 Cush. 481; *Com. v. Davidson*, 1 Cush. 33, 45; *Long v. Drew*, 114 Mass. 77; *Sanders v. Duval*, 1 Exch. 467; *Randal v. Canal Co.*, 1 Har. (Del.) 233; *Blake v. Russ*, 33 Me. 360; *Penobscot Boom Cor. v. Lamson*, 16 Me. 224; 33 Am. Dec. 656; *Anderson v. Root*, 16 Miss. 362; *Withers v. Gillespy*, 7 Serg. & R. (Pa.) 10; *Wooten v. Nale*, 18 Ga. 609; *Morrison v. Whiteside*, 17 Md. 452; 79 Am. Dec. 661.

6, *Austin v. Thompson*, 45 N. H. 113; *Withers v. Gillespy*, 7 Serg. & R. (Pa.) 10; *Smith v. Rentz*, 131 N. Y. 169; *Kenny v. Clarkson*, 1 Johns. 385; *Sager v. Kitchen*, 1 Esp. 209.

§ 228. Proof of the contents of lost documents. — The rule has been declared that the proof of the contents of a lost document should be such as to leave no reasonable doubt as to the substantial parts of the paper.¹ There seems, however, no legitimate reason for insisting upon the extreme strictness implied by such a rule. There are cogent reasons for requiring that lost documents should be proved clearly and in a satisfactory manner, when secondary evidence is resorted to, but in the opinion of the author this is all that should be required. The weight of authority seems to be that when secondary evidence is admissible to prove the contents of documents, the fact to be established should

be proved by a fair *preponderance* of the evidence, and with reasonable certainty. It is not to be expected that witnesses can recite the contents of written instruments word for word. It is enough, if intelligent witnesses have read the paper and can state substantially its contents and import with reasonable accuracy.² The court of appeals of New York used this language in respect to a lost deed: "The evidence in such cases, however, should show that the deed was properly executed with the formalities required by law and should show all the contents of the deed, not literally, but substantially. If anything less than these requirements would suffice, evil practices which it was the object of the statute of frauds to prevent would be encouraged."³ Hence the testimony of one who has heard a deed read some years before and who can give only a small portion of its contents is insufficient.⁴ So when a witness had only a hasty glance at a letter and heard only a part of its contents read, it was held that he was not a competent witness to testify to the contents.⁵ The *substance* of the document should be proved satisfactorily. The witness should speak from recollection of the writing and not give his impressions drawn from conversations and negotiations preliminary to the contract.⁶ But it is not a valid objection to the testimony of one who knows the contents of a letter that the one

who wrote the letter is not produced as a witness.¹

1, Renner v. Bank of Columbia, 9 Wheat. 581; Bennett v. Walker, 23 Ill. 97.

2, Camden v. Belgrade, 78 Me. 204; Posten v. Rasette, 5 Cal. 467; Clark v. Houghton, 12 Gray 38; Hulls v. Kimball, 52 Ill. 391; Rhode v. McLean, 101 Ill. 467; Parks v. Candle, 58 Tex. 216.

3, Edwards v. Noyes, 65 N. Y. 121.

4, Edwards v. Noyes, 65 N. Y. 125; Appeal of Richards, 122 Pa. St. 547.

5, Coxe v. England, 65 Pa. St. 212.

6, Richardson v. Robbins, 124 Mass. 105; Tayloe v. Riggs, 1 Peters 591.

7, Liebanan v. Pooley, 1 Stark. 167.

§ 229. Degrees of secondary evidence.

The rule has become well settled in England that when documents are lost or when they are under the control of the adverse party and are not produced after due notice, parol evidence may be given of their contents, even though there may be a copy or an abstract of the same which might be produced, in other words, it is there held that there are *no degrees of secondary evidence*.¹ But in most of the states in this country, where the question has arisen, this rule has been rejected. In those states it has been considered more consistent with the general rule requiring the best evidence that a party should not be allowed to give parol evidence of a document, if it is prac-

licable to obtain a correct copy and this fact appears in evidence. This is generally called the *American rule* as distinguished from that which has come to prevail in England on this subject. This view may be said to have been adopted by the supreme court of the United States,² as well as by those of Alabama,³ Georgia,⁴ Illinois,⁵ Maine,⁶ Pennsylvania,⁷ Arkansas,⁸ Wisconsin,⁹ Iowa¹⁰ and New York.¹¹ While the English rule prevails in Massachusetts,¹² Indiana¹³ and Michigan.¹⁴ Although the so-called American rule seems likely to prevail in this country, it is by no means a settled question. There has been but very little discussion of the subject; and in several of the decisions, most frequently cited in its support, the subject was either not discussed or the decision on this point was *obiter dictum*. As illustrations of the view that there are no degrees of secondary evidence, it has been held that a party may give parol evidence of a lost deed or letter, though it be shown that he has a copy in his possession;¹⁵ that after notice to the adversary to produce the original letter, a copy sworn to be correctly made from a press copy of a letter is admissible to prove the contents without producing the press copy,¹⁶ and that if the testimony of a deceased witness is to be proved, any person who heard the testimony may be called, although the testimony was accurately taken down by a stenographer.¹⁷

1, *Doe v. Ross*, 7 M. & W. 102, 106; *Hall v. Ball*, 3 Man. & G. 242; Tayl. Ev. sec. 550.

2, *Cornett v. Williams*, 20 Wall. 226; *Renner v. Bank of Columbia*, 9 Wheat. 581, 597.

3, *Harvey v. Thorpe*, 28 Ala. 250; 65 Am. Dec. 344.

4, *Williams v. Waters*, 36 Ga. 454.

5, *Illinois Land Co. v. Bonner*, 75 Ill. 315.

6, *Nason v. Jordan*, 62 Me. 480.

7, *Stevenson v. Hoy*, 43 Pa. St. 191.

8, *Davies v. Pettit*, 11 Ark. 349.

9, *Johnson v. Ashland Lumber Co.*, 52 Wis. 458.

10, *Higgins v. Reed*, 8 Iowa 298; 74 Am. Dec. 305.

11, *Blade v. Noland*, 12 Wend. 173; 27 Am. Dec. 126; *New York Co. v. Richmond*, 6 Bosw. (N. Y.) 213.

12, *Goodrich v. Weston*, 102 Mass. 362; 3 Am. Rep. 469.

13, *Carpenter v. Dame*, 10 Ind. 125.

14, *Eslow v. Mitchell*, 26 Mich. 500. But see, *Dillon v. Howe*, 98 Mich. 168.

15, *Brown v. Woodman*, 6 Car. & P. 206; *Doe v. Ross*, 7 M. & W. 102; *Hall v. Ball*, 3 Man. & G. 242; Tayl. Ev. sec. 550.

16, *Goodrich v. Weston*, 102 Mass. 362; 3 Am. Rep. 469.

17, *Jeans v. Wheedon*, 2 Moody & Rob. 486; *Rex v. Christopher*, 4 Cox 76. See also, *State v. McDonald*, 65 Me. 466.

§ 230. **Same — Cases illustrating the American rule.**—The following cases among others illustrate the so-called American rule: Where it was proved that a copy of a note could be produced, parol evidence was held improper.¹ The same rule was held to apply in the case of a lost will, there being a certi-

fied copy,³ as well as to lost deeds and records.³ In another case it was held that after the destruction of a record of conviction, oral proof of the contents was improper as the law required a transcript of such convictions to be filed in the court of exchequer which transcript, properly authenticated, the law made good evidence of the conviction.⁴ So it was held that an extract from a lost letter cannot be given in evidence without calling for the writer to produce his letter-book;⁵ that the plaintiff could not prove by parol the contents of a letter when it appeared that he had in his possession a fac-simile of the original,⁶ and that a copy of a certified copy of a lost original is not admissible to prove the contents of the original.⁷ But even under the American rule it has been held that when the nature of the case does not itself disclose the existence of such better evidence the objector must prove its existence.⁸

1, *United States v. Britton*, 2 Mason (U.S.) 464.

2, *Illinois Land Co. v. Bonner*, 75 Ill. 315.

3, *Marimer v. Saunders*, 10 Ill. 113; *Lowry v. Cady*, 4 Vt. 504; 24 Am. Dec. 628; *Cornett v. Williams*, 20 Wall. 226; *Hilts v. Colvin*, 14 Johns. 182; *Platt v. Haner*, 27 Mich. 167; *Ellis v. Huff*, 29 Ill. 449; *Harvey v. Thorpe*, 28 Ala. 250; 65 Am. Dec. 344.

4, *Hilts v. Colvin*, 14 Johns. 182.

5, *Dennis v. Barber*, 6 Serg. & R. (Pa.) 420.

6, *Stevenson v. Ho.*, 43 Pa. St. 191.

7, *Dyer v. Hudson*, 65 Cal. 372.

8, *Minneapolis Times Co. v. Nimocks*, 53 Minn. 381.

§ 231. Parol evidence not allowed when the law requires copies.— It is not claimed by the advocates of either rule that all classes of secondary evidence are equally satisfactory. For example, it is not contended that the recollection of one who has read a document is as likely to be correct as a carefully made copy of it. Those who assert that there are no degrees of secondary evidence admit that the jury may draw an unfavorable inference against a party who should give parol evidence of the contents of a document, if he has a correct copy under his control. But they contend that such evidence would be legally competent and that any other theory destroys all the distinctions between the weight and the admissibility of evidence. Even though the rule that there are no degrees of secondary evidence should prevail, it is not claimed that it applies in those cases where the law has expressly substituted certain kinds of copies for primary evidence. For example, certified or examined copies of public records should be offered, if obtainable, rather than parol evidence;¹ and in such case parol evidence will not be received, unless it is shown that no copy can be obtained.²

1, Tayl. Ev. sec. 552 and cases cited.

2, Tayl. Ev. sec. 552; Doe v. Ross, 7 M. & W. 106; MacDougall v. Young, Ryan & M. 392; Culver v. Uthe, 133 U. S. 655; Robertson v. DuBose, 76 Tex. 1.

§ 232. Cross-examination of witnesses as to writings.—It was long a mooted question in England whether the ancient rule, that written instruments, if in existence, should be proved by the instruments themselves, should be so relaxed as to allow witnesses on cross-examination to be asked their contents. It is beyond the scope of this work to state fully the conclusions on this subject which were announced in the celebrated case known as Queen Caroline's case.¹ The judges, in answer to questions propounded to them by the House of Lords, stated as their conclusions that, in their judgment, a party on cross-examination could not represent in the statement of a question the contents of a letter and ask the witness whether he wrote such letter, without having first shown it to the witness and having received an affirmative answer to the question whether the witness had written the letter. They further held that when a writing is produced and a witness is shown a part of the same, he may be asked whether he wrote such part shown him. But that if he should not admit that he did or did not write such part, he could not be examined as to the contents of the writing. And thirdly it was held that when a letter is produced and the witness admits that he wrote it, he can not be asked whether or not such and such statements are contained therein. And that, if the letter is read in evidence, it should be offered

by the cross-examining counsel as part of his evidence after the opening of his case, unless he suggests to the court that he desires to have it read at once as a basis for cross-examination. And finally it was held that, if a witness is asked on cross-examination whether he has made representations of a particular nature without specifying whether the question refers to representations in writing or in words, the question should be divided into parts and the counsel be directed to ask whether the representation had been made in writing or in words; and if it appeared to be in writing the testimony would be inadmissible.¹ It will be observed that these answers adhered to the old rule that the contents of written instruments should be proved by the instruments themselves. Although this rule has been so changed by statute in England that a witness may be now cross-examined as to previous written statements made to him without showing him the writing, it is still the rule in this country that the writing should be first produced and shown the witness so that he may have an opportunity for inspection and examination.²

1, Queen's Case, 2 Brod. & B. 284, 292.

2, See sec. 850 *infra*, and the authorities there cited.

CHAPTER 8.

SUBSTANCE OF THE ISSUE.

§ 233. Common law rules as to substance of the issue.

§ 234. The modern rules as to substance of the issue—Amendments.

§ 235. Same, continued.

§ 233. Common law rules as to substance of the issue. — It was one of the established rules of the common law that only the substance of the issue need be proved. This rule gave rise to constant discussion, and courts differed widely upon the subject. It was often a question of the greatest importance, because a *variance*, — that is a disagreement between the allegation and the proof in some matter which in point of law is essential to the charge or claim,¹ — was as fatal to the case of the party who had the burden of proof as was a total failure of evidence, for the jury were bound to render a verdict against him in case of such a variance.² As the plaintiff had the privilege of setting forth his claim in such terms as he chose when he framed his complaint, the courts often gave this rule a very technical construction and forced him to prove his case exactly as he had

set it forth in the complaint. The courts were favorably inclined to this technical rule because of the fact that the object of the pleadings was to inform the court and the parties of the real issue and to so perfect the record that at any future time the exact point decided could be found. But the rule was so far relaxed that the agreement between the allegations and the proofs was required only in those particulars legally essential to support the charge or claim. Nor did the court require proof of all that was alleged in the pleadings. If any of the allegations could be stricken out without destroying the plaintiff's right of action, they were treated as mere *surplusage*; and no proof of them was required. *Utile non debet per inutile vitiari.*³ But the courts adhered with extreme technicality to the rule that all allegations that could not be stricken out without removing facts essential to the cause of action must be strictly proved as alleged. To prove a certain parish to be *St. Ethelburga* which was alleged as *St. Ethelburg* in the pleadings,⁴ or to prove a prosecution before Baron Waterpark of *Waterpark*, when it was alleged as before Baron Waterpark of *Waterfork*⁵ were both held to be fatal variances under the old common law rule. So it was held a fatal variance to allege that one partner was the owner of partnership goods that had been stolen, and the accused was acquitted on this ground.⁶ It

was also held a fatal variance to allege the ownership of a house in a *feme covert*,⁷ or to allege an absolute contract where the proof showed it to be in the alternative.⁸ The extreme technicality with which the old rule was applied by the common law courts is well shown by the following cases: In an indictment for bigamy it was a fatal variance to describe a woman as a "widow," when it was proved that she had never been married,⁹ or as "Ann Gooding," when her full name was "Sarah Ann Gooding."¹⁰ So it was fatal variance to describe a wood as "The Old Walk," its real name being "The Long Walk,"¹¹ or to describe a "heifer" as a "cow,"¹² or a "lamb" as a "sheep"¹³ or as a "ewe."¹⁴ Even the presence of one letter "s" too many at the end of a word puzzled the court and there was great doubt as to whether this ought not to be considered a fatal variance.¹⁵ If for any reason the pleadings should describe matters connected with the cause of action with *unnecessary particularity*, the plaintiff was obliged to prove each detail if it could be considered essential to the cause of action.¹⁶ For example, although it was not necessary to prove a horse's color in order to convict one of stealing the animal, yet the courts held that, if color was alleged, it must be proved as alleged.¹⁷ Probably the greatest injustice arising from this technical rule of the common law was in the case of *writings* where a

mere literal variance in setting forth the essential parts in the pleadings was fatal to the action, for the court had no power of reconciling the record with the evidence.¹⁸ Although the instances here given to illustrate the strictness of the old rule were for the most part criminal cases, it is hardly necessary to cite authority to the familiar rule of the common law that in both civil and criminal cases every material and essential allegation in the charge or the defense and every circumstance descriptive of anything so alleged, if disputed, had to be proved in substance as averred.¹⁹

1, Greenl. Ev. sec. 63.

2, Steph. Pl. (Tyler's ed.) p. 118; Tayl. Ev. sec. 218.

3, Gibbs v. Cannon, 9 Serg. & R. (Pa.) 198; Panton v. Holland, 17 Johns. 92; Twiss v. Baldwin, 9 Conn. 291; Livingstone v. Swanwick, 2 Dall. 300.

4, Wilson v. Gilbert, 2 Bos. & P. 281.

5, Walters v. Mace, 2 Barn. & Ald. 756.

6, Com. v. Trimmer, 1 Mass. 476.

7, State v. Martin, 3 Murph. (N. C.) 523.

8, Penny v. Porter, 2 East 2.

9, Rex v. Deeley, 1 Moody Cr. C. 303.

10, Reg. v. Gooding, Car. & M. 297.

11, Rex v. Owen, 1 Moody Cr. C. 181.

12, Cook's Case, 1 Leach Cr. C. 105.

13, Rex v. Loom, 1 Moody Cr. C. 160.

14, Rex v. Puddifoot, 1 Moody Cr. C. 247.

15, Jones v. Mars, 2 Camp. 305.

16, Bristow v. Wright, 2 Dougl. 665; 1 Smith Lead. Cas. 1417.

17, State v. Jackson, 30 Me. 29.

18, Bristow v. Wright, 2 Dougl. 665; 1 Smith Lead. Cas. 1417; Sauls v. Ledger, 2 Ld. Raym. 792; State v. Caffey, 2 Murph. (N. C.) 321; Sheehy v. Mandeville, 7 Cranch 208, 217; Com. v. Stow, 1 Mass. 54; Saxton v. Johnson, 10 Johns. 418. Even such a trivial mistake as using the word "nor" for "not" has been held a fatal variance, Drake's Case, 2 Salk. 660. In Olin v. Chipman, 2 Tyler (Vt.) 148, it was held a fatal variance to use the word "our" in place of the word "the."

19, Greenl. Ev. sec. 66.

§ 234. The modern rules as to substance of the issue—Amendments.—Any extended discussion of the old rule is not within the scope of this work, nor is it of any very great importance, since this old common law rule has been rendered obsolete in most jurisdictions by statutes making it possible to *amend the pleadings*. The statutes by allowing the correction of slight and non-essential mistakes in pleadings,—of variances between the pleadings and the proof,—prevent the injustice that came from the technical enforcement of the old rule. Often the party would be nonsuited or the real point at issue would not be determined and the parties would be excluded from all further remedy because of the technical enforcement of the rule. A series of acts have been passed in England abrogating the old rules in both civil and criminal cases. Similar statutes have been

adopted throughout this country.¹ These statutes make radical changes, modifying the rules which so long prevailed. They not only allow amendments before, but also after, final judgment, when justice seems to demand. These statutes in most of the states contain similar provisions, but the practitioner must refer to the law of his own jurisdiction in order to settle details. In general they provide that in both civil and criminal cases the court may, either before or after judgment, in furtherance of justice and on such terms as may be just, amend any process, pleading or other proceeding by conforming the pleadings or other proceedings to the facts proved. This may be done by any amendment that does not substantially change the claim or defense and thus prejudice the rights of the adverse party. It is usually provided that no process shall be quashed for any defect or want of form, if this defect can be remedied by an amendment; and the statutes usually direct the court to disregard such errors or defects in the pleadings or other proceedings as do not affect the rights of the adverse party.² Many of the statutes allow each pleading to be amended once as a matter of course without special application to the courts. A judgment will not be reversed for a defect in the pleading, when the record shows that there has been a full trial of the case; that substantial justice has been done, and that

neither party has been prejudiced by the defect.³ With scarcely a single dissent the authorities hold that these statutes should be liberally construed by the courts to further the ends of substantial justice.⁴ Notwithstanding the similarity of the provisions of the codes relating to amendments to pleadings, there is a wide difference in the rule established by the courts of the different states as to amendments which alter or vary the cause of action. The authorities in a majority of the code states hold that courts do not have the power to change the form or vary the nature of an action by an amendment substituting a wholly new and distinct cause of action, not connected with that embraced in the original pleading.⁵ They hold, for example, that a cause of action cannot be changed from one at *law* to one in *equity* or *vice versa*,⁶ nor can the cause of action be changed from *tort* to *contract*, nor from *contract* to *tort*.⁷ These rules have reference to the substance rather than to the form of the action, as the nice distinctions between the mere forms of action existing at common law have been abolished by the codes, and the facts showing the cause of action are now all that are essential.⁸ The statutes of a few of the states even permit certain amendments that change the form of the action. From the multitude of decisions on the subject the cases already cited will serve to indicate the

line drawn by the courts. As a general rule when it is within the power of the court to allow an amendment, leave to amend ought not to be refused unless the court is satisfied that the party is acting in bad faith or that the mistake has caused such injury to the other party that the proposed amendment would operate unjustly, if allowed.⁹ Allegations as to names, time, value, quantity or place may be corrected, changed, added to or stricken out so long as the cause of action remains the same.¹⁰ So such changes can be made by amendment as will prevent the failure of an action in such cases as those where the action is *quantum meruit* and the proof shows an agreed price, or *vice versa*.¹¹ Most states allow the addition of a new defense or a new cause of action, when this does not change the nature of the action or defense.¹² In general any amendment may be made that in the discretion of the court seems just, provided the whole nature and scope of the action is not changed. Equity courts were much more liberal than those at common law in allowing amendment. But the same rules now govern the amendment of pleadings both in equity and in law.¹³ The discretion of the judge in allowing or refusing these amendments will not be reviewed by any other court, unless in case of manifest abuse of this discretionary power.¹⁴

1, A concise historical discussion of the changes in the law relating to variance and a review of the authorities will be found in 1 Smith L. C. 1420. See also note to *Stevenson v. Mudgett*, 10 N. H. 338; 34 Am. Dec. 158. An exhaustive discussion of the subject of amendments will be found in 1 Ency. Pl. & Prac. 458-701.

2, See the statutes of the jurisdiction.

3, *Doniphan v. Street*, 17 Iowa 317.

4, *Saint v. Guerrierio*, 17 Col. 448; 31 Am. St. Rep. 320; *Reeder v. Sayre*, 70 N. Y. 180; *Tieman v. Woodruff*, 5 McLean 135; *Hayden v. Hayden*, 46 Cal. 332; *Reyburn v. Mitchell*, 106 Mo. 365; *Burns v. Scooffy*, 98 Cal. 271; *Miller v. Pollock*, 99 Pa. St. 202; *Brown v. Bosworth*, 62 Wis. 542; *Phelps v. Enz*, 19 Conn. 58; *Baldock v. Atwood*, 21 Ore. 73; *Beecher v. Wayne Circuit Judges*, 70 Mich. 363; *Drake v. Drake*, 83 Ill. 526; *Solon v. Perry*, 54 Me. 493.

5, *Rutledge v. Vanmeter*, 8 Bush (Ky.) 354; *People v. Circuit Judge*, 13 Mich. 206; *Wyman v. Kilgore*, 47 Me. 184; *Little v. Morgan*, 31 N. H. 499; *Williams v. Hollis*, 19 Ga. 313; *Sumner v. Brown*, 34 Vt. 194; *Ward v. Patton*, 75 Ala. 207; *Tatham v. Ramey*, 82 Pa. St. 130; *Royse v. May*, 93 Pa. St. 454; *Shenandoah Ry. Co. v. Griffith*, 76 Va. 913; *Oglesby v. Attrill*, 14 Fed. Rep. 214; *Mahan v. Smitheman*, 71 Ala. 563; *Peck v. Sill*, 3 Conn. 157; *State v. Morgan*, 35 La. An. 1139; *Snyder v. Harper*, 24 W. Va. 206; *Brodek v. Hirschfield*, 57 Vt. 12; *Supervisors v. Decker*, 34 Wis. 378. See note, 34 Am. Dec. 160.

6, *Shinners v. Brill*, 38 Wis. 648; *Carmichael v. Argard*, 52 Wis. 607; *White v. Morse*, 67 Ga. 89; *Bockes v. Lansing*, 74 N. Y. 437. But some courts hold that this may be done if the identity of the subject matter of the suit remains the same, *Cook v. Chicago Ry. Co.*, 75 Iowa 69; *Duff v. Snider*, 54 Miss. 245; *Costagnino v. Balletta*, Cal. 250.

7, *Neudecker v. Kohlborg*, 81 N. Y. 296; *Hackett v. Bank*, 57 Cal. 335; *Sumner v. Rogers*, 90 Mo. 324; *Barnes Quigley*, 59 N. Y. 265; *Degraw v. Elmore*, 50 N. Y. 1;

People v. Dennison, 84 N. Y. 272; Lockwood v. Quackenbush, 83 N. Y. 607; Rothe v. Rothe, 31 Wis. 570; Pierce v. Carey, 37 Wis. 232; Ramirez v. Murray, 5 Cal. 222; Lane v. Cameron, 38 Wis. 603; Steed v. McIntyre, 68 Ala. 407; Peck v. Still, 3 Conn. 157; Goss v. Boulder County, 4 Col. 468; Froust v. Hardin, 56 Ind. 165. See illustrations in note, 34 Am. Dec. 158.

8, Crother v. Acock, 43 Mo. App. 318, 323.

9, Kirstein v. Madden, 38 Cal. 158; Bradley v. Parker, (Cal.) 34 Pac. Rep. 234; Balch v. Smith, 4 Wash. St. 497, 504; Blankhorn v. Penrose, 43 Law T. 668.

10, State v. Smith, 12 Ark. 622; Millee v. Pollock, 99 Pa. St. 202; Bank of Cooperstown v. Woods, 28 N. Y. 545; State Ins. Co. v. Schreck, 27 Neb. 527; Houston, E. & W. T. Ry. Co. v. Blagge, 73 Tex. 24; Thalheimer v. Crow, 13 Col. 397; People v. Toneilli, 81 Cal. 275; Wentworth v. Sawyer, 76 Me. 434; Diettrich v. Wolffsohn, 136 Mass. 335; Ward v. Stevenson, 15 Pa. St. 21; Elliot v. Clark, 18 N. H. 421; South Alabama Ry. Co. v. Small, 70 Ala. 499; Place v. Minster, 65 N. Y. 89.

11, Ludlow v. Dole, 62 N. Y. 617; Sussdorff v. Schmidt, 55 N. Y. 319.

12, See statutes of the jurisdiction. Brown v. Bosworth, 62 Wis. 542; Jones v. Ritter, 56 Ala. 270; Stevens v. Matthewson, 45 Kan. 594.

13, Curtis v. Leavitt, 11 Paige (N. Y.) 386; Rodgers v. Atkinson, 14 Ga. 320; Larkins v. Biddle, 21 Ala. 252; Fenno v. Coulter, 14 Ark. 39.

14, Wixon v. Devine, 91 Cal. 477; Palmer v. Utah Ry. Co., 2 Idaho 350; Lindley v. Sullivan, 133 Ind. 588; Donnelly v. Pepper, 91 Ky. 363; Burke v. Baldwin, 54 Minn. 514; Johnson v. Swayze, 35 Neb. 117; Brock v. Bateman, 25 Ohio St. 609; Garrison v. Goodale, 23 Ore. 307; Mellish v. Richardson, 9 Bing. 125; Jenkins v. Phillips, 9 Car. & P. 766; Merriam v. Langdon, 10 Conn. 460; Chiracv. Reinecker, 11 Wheat. 278; Brown v. Bosworth, 62 Wis. 542. It, however, is reversible error to refuse to exercise this discretion on ground of want of power when the court really has the power, Russell v. Conn., 20 N. Y. 81.

§ 235. Same, continued.—These code provisions have not changed the old common law rule that the cause of action or defense proved must correspond with that averred in the pleadings. The important difference between the old and new rule, as these statutes are interpreted by the courts of a majority of the states, is that the codes have introduced a new rule for determining what a variance is and what its consequences are.¹ The plaintiff cannot recover under the codes when the evidence establishes a wholly different case from that alleged any more than he could under the old common law.² But a substantial, not a literal, agreement is all that is required.³ The courts in treating the discrepancies between the allegations and the proof usually distinguish three degrees of discrepancy under the codes,—namely, immaterial variance, material variance and failure of proof. These codes usually provide that a variance shall be considered material when it has actually misled the adverse party to his prejudice. If the variance has not so misled the adverse party, it is to be deemed immaterial.⁴ The practical bearing of the distinction drawn between material and immaterial variances is that in the case of a material variance the codes usually provide that an amendment may be allowed on such terms as the courts deem just, while if the variance is immaterial the court may order

an immediate amendment or, what amounts to the same thing, disregard the variance and allow the case to be decided upon the evidence.⁵ Among the many variances that have been held immaterial are slight errors in the amount or description of property⁶ or in dates that are not of the gist of the action.⁷ The variance is immaterial where the pleading alleges an express agreement or warranty and the evidence shows an implied one;⁸ or where a sale in writing is averred and the proof shows a sale by parol,⁹ or where there is some slight mistake in the names of either party to a civil or criminal action.¹⁰ Objection must be made to the variance between the allegations and the proof before final judgment, or the variance will be remedied by the verdict.¹¹ Where the proof fails to support the allegations, not in some particulars only, but in their entire scope and meaning, it is not a variance but a failure of proof which cannot be cured by amendment and the action must be dismissed.¹²

1, *Carpenter v. Huffsteller*, 87 N. C. 273; *Neudecker v. Kohlberg*, 81 N. Y. 296.

2, *Fountain v. Fountain*, 23 Ill. App. 529. See Pom. Rem. & Rem. R. sec. 534 for illustrations of fatal disagreement.

3, *Moore v. Lake Co.*, 58 N. H. 254.

4, *Kopplekom v. Huffman*, 12 Neb. 95; *Crane v. Ring*, 48 Kan. 61; *Robbins v. Diggings*, 78 Iowa 521; *Chewacka Works v. Dismukes*, 87 Ala. 345; *Brown v. Sullivan*, 71 Tex. 470.

5, *Carpenter v. Huffsteller*, 87 N. C. 273; *Coleman v. Playsted*, 36 Barb. (N. Y.) 26; *Pratt v. Hudson R. Ry. Co.*, 21 N. Y. 305; *Lucas v. Smith*, 42 Ind. 103; *Giffert v. West*, 33 Wis. 617; *Pom. Rem. & Rem. R. sec. 554*.

6, *People v. Eaton*, 41 Cal. 657; *Bank of Cooperstown v. Woods*, 28 N. Y. 545.

7, *United States v. LeBaron*, 4 Wall. 642; *Willer v. Berghenthal*, 50 Wis. 474.

8, *Smith v. Lippencott*, 49 Barb. (N. Y.) 398; *Giffert v. West*, 33 Wis. 617; *Farrell v. Palmer*, 36 Cal. 187.

9, *Patterson v. Keystone Mining Co.*, 30 Cal. 360, 364.

10, *Long v. Campbell*, 37 W. Va. 668; *Milk v. Christie*, 1 Hill (N. Y.) 102; *Bratton v. Seymour*, 4 Watts (Pa.) 329; *Thompson v. Lee*, 21 Ill. 242; *McKay v. Speak*, 8 Tex. 376; *O'Brannan v. Saunders*, 24 Gratt. (Va.) 138; *Tucker v. People*, 122 Ill. 583; *Choen v. State*, 52 Ind. 347; *People v. Ferris*, 56 Cal. 442; *Dabneys v. Knapp*, 2 Gratt. (Va.) 355. See the long list of cases of immaterial variance decided by the various state courts collected in *Rice's Col. Code Proc.* 185. See also, *Pom. Rem. & Rem. R. sec. 555*.

11, *Coates v. Bank*, 91 N. Y. 20, 31; *Russell v. Loomis*, 43 Wis. 545; *O'Connor v. Delaney*, 53 Minn. 247; *Tognini v. Kyle*, 17 Nev. 209; *Home Ins. Co. v. Bethel*, 42 Ill. App. 475; *The City of Lincoln*, 19 Fed. Rep. 460; *Liddell v. Fisher*, 48 Mo. App. 449. A general objection to evidence is not sufficient to raise the question of variance, *Richards v. Bestor*, 90 Ala. 352.

12, *Pom. Rem. & Rem. R. sec. 554*; *Carpenter v. Huffsteller*, 87 N. C. 273; *Cincinnati Ry. Co. v. Bunnell*, 61 Ind. 183; *Johnson v. Moss*, 45 Cal. 515; *Volkening v. DeGraaf*, 81 N. Y. 268; *Pendleton v. Dalton*, 96 N. C. 507; *Faulkner v. Faulkner*, 73 Mo. 327. It is fatal to allege tort and prove contract, even if allowed by the court to so amend, as it is a failure of proof, *Hackett v. Bank*, 57 Cal. 335; *Rothe v. Rothe*, 31 Wis. 570; *Bank v. Schultz*, 2 Ohio 471; *DeGraw v. Elmore*, 50 N. Y. 1. So it is fatal to allege fraud and prove breach of warranty or of contract, *Ross v. Mather*, 51 N. Y. 108; 10 Am. Rep. 562; *Watts v. Mc-*

Allister, 33 Ind. 264; or to allege a contract and prove a tort, Johannesson v. Borschenius, 35 Wis. 131; Ramirez v. Murray, 5 Cal. 222; Beard v. Yates, 2 Hun 466. But a failure of proof as to facts not essential to constitute a cause of action will not defeat the plaintiff's action, Nolte v. Hill, 36 Ohio St. 186.

CHAPTER 9.

ADMISSIONS.

- § 236. Admissions — Confessions — Declarations by party in his own behalf inadmissible.
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- § 269. Admissions by public corporations.
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- § 276. Same — When conclusive.
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- § 279. Same — Where admissions are in good faith and by mistake.
- § 280. Same — Erection of improvements — Boundary lines.
- § 281. Same — The act must be calculated to mislead and actually mislead.
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§ 285. Qualifications as to mere general recitals—
Other qualifications of general rule.

§ 286. As between landlord and tenant.

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— Bailee, etc.

§ 288. Acceptance of bills of exchange.

§ 289. Form of admissions — Conduct.

§ 290. Same — Repairing defective machinery or
highways

§ 291. Admissions may be implied from silence.

§ 292. Same — No admission from silence at judi-
cial proceeding.

§ 293. Offers of compromise.

§ 294. Effect of paying money into court.

§ 295. The whole statement to be received.

§ 296. Same — Written admissions.

§ 297. Weight of admissions.

§ 298. Same, continued.

§ 236. Admissions—Confessions—De-
clarations of a party in his own behalf
inadmissible.— An admission is defined by
Mr. Stephen to be “a statement, oral or writ-
ten, suggesting any inference as to any fact
in issue or relevant or deemed to be relevant
to any such fact, made by or on behalf of any
party to any proceeding.”¹ “A *confession*
is a person’s declaration of his agency or par-
ticipation in a crime.”² It has been uni-
formly held indispensable to show that such
confessions were freely and voluntarily given,
for without such proof confessions cannot be
received. But as the subject of confessions
belongs more properly to the criminal law it
is not treated in this work.³ It would be

obviously unsafe if parties to litigation were without restriction allowed to support their claims by proving their own statements made out of court. Such a practice would be open not only to all the objections which exist against the admission of hearsay in general, but would also open the door to fraud and to the fabrication of testimony. Of course when the statements of a party become relevant on other grounds, as when they form part of the act or contract to be proven or where they constitute part of the *res gestae*, they are admissible whether favorable or unfavorable to his interest. But it is a general rule of broad application that the *declarations of a party* in his own favor are *not admissible in his behalf*.⁴ The following are illustrations of statements of this character which are incompetent: The declarations of one accused of crime when such declarations form no part of the act;⁵ letters written by a party asserting facts favorable to himself;⁶ letters written to the adverse party, there being no proof of any answer or acquiescence,⁷ and the letter of the plaintiff making a claim for damages in an action against a railway company for personal injuries.⁸ The conduct, admissions and declarations of a party in his own interest are no more competent as evidence for his estate after his death than for himself while living; and if such statements were not made in the presence of the adverse party, they are inadmissible in a suit against the estate.⁹

1, Steph. Ev. art. 15. An able review of the authorities on the subject treated in this chapter will be found in 95 Am. Dec. 51-76.

2, *People v. Parton*, 49 Cal. 632, 637.

3, A full review of the authorities will be found in the notes, 6 Am. St. Rep. 242-251; 41 Am. St. Rep. 522-524.

4, *Martin v. Williams*, 18 Ala. 190; *Gordon v. Clapp*, 38 Ala. 357; *Hazen v. Henry*, 6 Ark. 86; *Rice v. Cunningham*, 29 Cal. 492; *North Stonington v. Stonington*, 31 Conn. 412; *Heard v. McKee*, 26 Ga. 332; *Scobey v. Armington*, 5 Ind. 514; *Murray v. Cone*, 26 Iowa 276; *Tipper v. Com.*, 1 Met. (Ky.) 6; *Handley v. Call*, 30 Me. 9; *Hogan v. Hendry*, 18 Md. 177; *Carter v. Gregory*, 8 Pick. 165; *Hogsett v. Ellis*, 17 Mich. 351; *Moore v. Sanbourn*, 42 Mo. 490; *Judd v. Brentwood*, 46 N. H. 430; *Smith v. Kerr*, 1 Barb. 155; *State v. Jefferson*, 6 Ired. (N. C.) 305; *Graham v. Hollinger*, 46 Pa. St. 55; *Barber v. Bennett*, 62 Vt. 50; *Bloun v. Hamey*, 43 Mo. App. 644; *Cohn v. Heimbauch*, 86 Wis. 176; *Baker v. Kelly*, 41 Miss. 696; 93 Am. Dec. 274 and note.

5, *Oliver v. State*, 17 Ala. 587; *Campbell v. State*, 23 Ala. 44; *Chaney v. State*, 31 Ala. 342; *United States v. Milburn*, 2 Cranch C. C. 501; *Golden v. State*, 19 Ark. 590; *Dukes v. State*, 11 Ind. 557; 71 Am. Dec. 370; *Com. v. Cooper*, 5 Allen 495; 81 Am. Dec. 762; *State v. Hildreth*, 9 Ired. (N. C.) 440; 51 Am. Dec. 369.

6, *Freeborn v. Smith*, 2 Wall. 160; *Towle v. Stevenson*, 1 John. Cas. (N. Y.) 111; *Champlin v. Tilly*, 3 Day (Conn.) 303.

7, *Fearing v. Kimball*, 4 Allen 125; 81 Am. Dec. 690.

8, *Howard v. Savannah Ry. Co.*, 84 Ga. 711. Other illustrations of this rule will be found in the discussion of it that follows in this chapter.

9, *Ward v. Ward*, 37 Mich. 253; *Jilsun v. Stebbins*, 41 Wis. 235.

§ 237. Such statements are evidence for the adverse party—Why admissions competent.—The objections which have been pointed out in the last section do not hold against the reception of the statements of one party as evidence when such statements are offered by his adversary. "Whatever a party voluntarily admits to be true, though the admission be contrary to his interest, may reasonably be taken for the truth. The same rule it will be seen applies to admissions by those who are so identified in situation and interest with a party that their declaration may be considered to have been made by himself. As to such evidence the ordinary tests of truth are properly dispensed with; they are inapplicable. An oath is administered to a witness in order to impose an additional obligation on his conscience and so to add weight to his testimony, and he is cross-examined to ascertain his means of knowledge, as well as his intention to speak the truth. But where a man voluntarily admits a debt or confesses a crime, there is little occasion for confirmation; the ordinary motives of human conduct are sufficient warrants for belief." ¹ Although admissions have sometimes been treated as competent evidence under the head of one of the exceptions to hearsay evidence, yet they are open to but few of the objections which may be urged against hearsay testimony. They are, it is true, declara-

tions made out of court and without the sanction of an oath, yet they are statements, not of third persons, but of a party to the litigation; and when offered against him it is only fair to presume, until the contrary is shown, that they are correct. But it does not necessarily follow that whatever a party may say, though remotely connected with the litigation, may be offered as an admission against him. The statement or act should be *self-dis-serving* or of such a character that from it some inference may be fairly drawn to the party's prejudice.² If testimony is of such a character as to constitute an admission of the party, it is not necessary to lay a foundation for its reception by first asking the party if he has made such statements.³

1, Stark. Ev. (9th Ed.) p. 52; German Nat. Bank v. Leonard, 40 Neb. 676; Southern Ins. Co. v. White, 58 Ark. 277; Potter v. Ogden, 136 N. Y. 384; Larrison v. Payne, 52 Hun (N. Y.) 612; Riha v. Pelnar, 86 Wis. 408.

2, Dreich v. Nicolai, 16 Ore. 512; Gartner v. Beller, 54 Mich. 333; Fleming v. City of Springfield, 154 Mass. 520; Kinney v. Folkerts, 78 Mich. 687.

3, Planing Mill Co. v. Schuda, 72 Wis. 277; Brown v. Calumet River Ry. Co., 125 Ill. 600.

1238. Admissions by real and nominal parties.—The subject is presented in its simplest form when the admissions are made by one who is a party to the record and who is also the real party in interest. In such case it is very clear that the statements

and acts of the party, when they afford any presumption against him, may be received in behalf of the adverse party.¹ Under the ancient practice it often happened that the party to the record was only a nominal party; and it was sometimes held that in such cases his admissions were competent as against the real party in interest. Thus, the admissions of an *assignor*, the nominal plaintiff, that the debt had been paid might be given against his assignee.² But the rule came to prevail both in equity and in law that where the assignee was obliged in good faith to sue in the name of the assignor, the admissions of the assignor subsequent to the assignment were not admissible to affect the rights of the assignee;³ and where in such case a receipt of payment in full from the assignor is produced, the assignee may show that the assignment was previously made.⁴ Where the practice prevails that actions must be brought in the name of the real party in interest, it is clear that the admission in order to be competent must have been made by the *party* or by some one whose interest in the matter in controversy is identified with that of the party as of an agent, a joint owner or a predecessor.⁵

1, *McFadden v. Wallace*, 38 Cal. 51; *Duncan v. McMahon*, 37 Ind. 241; *Simons v. Vulcan Oil Co.*, 61 Pa. St. 202; 100 Am. Dec. 628; *Greer v. Higgins*, 8 Kan. 519; *Secor v. Pestance*, 37 Ill. 525; *Ward v. Leitch*, 30 Md. 326; *Maurice v. Warden*, 54 Md. 233; 39 Am. Rep. 384; *Leach*

v. Wilbur, 9 Allen 212; Snow v. Paine, 114 Mass. 520, Shafer v. Dean, 29 Iowa 144; Carlton v. Patterson, 29 N. H. 580; Phelan v. Bonham, 9 Ark. 389; Harvey v. Anderson, 12 Ga. 69; Tenney v. Evans, 14 N. H. 343; 40 Am. Dec. 194; Doyle v. St. James Church, 7 Wend. 178; State v. Littlefield, 3 R. I. 124; Hardy v. DeLeon, 5 Tex. 211; Goodnow v. Parsons, 36 Vt. 46.

2, Moriarity v. L. C. & D. Co., L. R. 52 Q. B. 320; Tenney v. Evans, 14 N. H. 343; 40 Am. Dec. 194; Dillon v. Chouteau, 7 Mo. 386; Johnson v. Kerr, 1 Serg. & R. (Pa.) 25.

3, Wardell v. Eden, 1 Johns. 531 in note; 2 Johns. Cas. 258; Timan v. Leland, 6 Hill 237; Owings v. Low, 5 Gill & J. (Md.) 134; Dunn v. Snell, 15 Mass. 481; Chapman v. Shattuck, 8 Ill. 749; Scott v. Hall, 6 B. Mon. (Ky.) 285; Palmer v. Cassin, 2 Cranch C. C. 66; State v. Jennings, 10 Ark. 428; Patrick v. McWilliams, 23 Ga. 348; Gillighan v. Tebbetts, 33 Me. 360; Cooke v. Cooke, 29 Md. 538; Garland v. Harrison, 17 Mo. 282; Frear v. Evertson, 20 Johns. 142. See sec. 245-248 *infra*.

4, Henderson v. Wild, 2 Camp. 561; Alner v. George, 1 Camp. 392; Frear v. Evertson, 20 Johns. 142. See also, Payne v. Rodgers, 1 Doug. 407; Winch v. Keeley, 1 T. R. 619; Tiernan v. Jackson, 5 Peters 580; Head v. Shaver, 6 Ala. 791.

5, Van Gelder v. Van Gelder, 81 N. Y. 625; Downing v. Mayes, 153 Ill. 330; Goldthorp v. Goldthorp, (Iowa) 62 N. W. Rep. 845. See also secs. 240 *et seq. infra*.

§ 239. Admissions may be made by those not parties, if identified in interest. Admissions may be made by persons not parties to the record, provided they have a substantial interest in the result.¹ For example, the admissions and acts of the *cestui que trust* are admissible, although he is not a party to the record, on the ground that he is the real party in interest.² In an action against a

sheriff for the default of his deputy the letters and declarations of the deputy are competent, since the deputy is answerable over to the sheriff in another action in which the record of the former action may be used as evidence.³ And where the effect of a contract is that a *surety* shall be responsible for the acts and admissions of the principal, such admissions are competent evidence against the surety.⁴ But ordinarily where a principal is not a party to the suit, his declarations are not admissible, unless they were made while the employment in which the principal was engaged continued, and in such manner as to be part of the *res gestae*.⁵ Before the declarations of one not a party to the record can be received on the ground that he is the real party in interest, such *interest must be shown* by competent evidence. And the *declarations* of one who is neither a party nor a witness are *inadmissible* for this purpose.⁶ It is also a requisite that the statements should have been made *during the continuance of the interest*. Declarations made after the declarant has ceased to have any interest in the matter are not admissions, but mere hearsay.⁷

1, Fiekett v. Swift, 41 Me. 65; 66 Am. Dec. 214; Bigelow v. Foss, 59 Me. 162; Benjamin v. Smith, 4 Wend. 332; 12 Wend. 404; Tyler v. Ulmer, 12 Mass. 163; Robinson v. Hutchinson, 31 Vt. 443; Milton v. Hunter, 13 Bush (Ky.) 163; Pike v. Wiggin, 8 N. H. 356.

2, *Hanson v. Parker*, 1 Wils. 257; *Harrison v. Vallance*, 1 Bing. 45; *Doe v. Wainwright*, 3 Nev. & P. 598.

3, *Tyler v. Ulmer*, 12 Mass. 163.

4, *Blair v. Perpetual Ins. Co.*, 10 Mo. 559; 47 Am. Dec. 129; *Snell v. Allen*, 1 Swan (Tenn.) 208; *Casky v. Haviland*, 13 Ala. 314; *United States v. Cutter*, 2 Curt. (U. S.) 617; *Bank of Brighton v. Smith*, 12 Allen 243; 90 Am. Dec. 144.

5, *Cheltenham Fire Brick Co. v. Cook*, 44 Mo. 29; *Tenth Nat. Bank v. Darragh*, 1 Hun 111; *Chelmsford Co. v. Demarest*, 7 Gray 1; *Com. v. Brassfield*, 7 B. Mon. (Ky.) 447; *Shelby v. Governor*, 2 Blackf. (Ind.) 289; *Lee v. Brown*, 21 Kan. 458; *Cassity v. Robinson*, 8 B. Mon. (Ky.) 279; *Hatch v. Elkins*, 65 N. Y. 489; *White v. German Nat. Bank*, 9 Heisk. (Tenn.) 475.

6, *Ryan v. Merriam*, 4 Allen 77.

7, *Deady v. Harrison*, 1 Stark. 60; *Bartlet v. Delprat*, 4 Mass. 702; *Clarke v. Waite*, 12 Mass. 439; *Bridge v. Eggleston*, 14 Mass. 245; 7 Am. Dec. 209; *Phoenix v. Day*, 5 Johns. (N. Y.) 412; *Patton v. Goldsborough*, 9 Serg. & R. (Pa.) 47; *Babb v. Clemson*, 10 Serg. & R. (Pa.) 419; 13 Am. Dec. 684.

§ 240. **Admissions by those in privity of interest—Grantor and grantee.**—We shall elsewhere discuss the rule by which judgments are made binding, not only upon parties to the record, but also upon those in privity with such parties.¹ It is on the same general principle that admissions may be competent when made by any one who is privy in law, in blood or in estate to any party to the proceeding.² In either case the judgment or admission is received on the theory that the person upon whom it operates is identified in interest with the party to the

suit. Where one person succeeds to the same rights of property formerly enjoyed by another, there is often such privity that the rights of the owner in such property may be affected by the statements of the latter. It will be seen that this principle has often been applied both in respect to real and personal property. In either case where the successor in title claims under a former owner, near or remote, he may be charged, subject to the limitations hereafter mentioned, with the admissions of his predecessor qualifying or limiting his rights in respect to such property.³ For example, it is admissible as against the grantee to prove the declarations of the grantor, while in possession, that his deed had been antedated.⁴

1, See sec. 603 *et seq. infra*.

2, Steph. Ev. art. 16; 1 Greenl. Ev. sec. 189. For definitions and illustrations of different classes of privies see sec. 603 *infra*; see also full note as to declaration of persons in possession, 95 Am. Dec. 70.

3, Chadwick v. Fonner, 69 N. Y. 404; McFadden v. Ellmaker, 52 Cal. 348; Gidney v. Logan, 79 N. C. 214; Cunningham v. Fuller, 35 Neb. 58; Norton v. Pettibone, 7 Conn. 319; 18 Am. Dec. 116; Taylor v. Hess, 57 Minn. 96; Blake v. Everett, 1 Allen 248; Beasley v. Clark, 102 Ala. 254; Graham v. Busby, 34 Miss. 272; Doughty v. McMillan, 92 Ga. 817; Fry v. Feamster, 36 W. Va. 454; Baker v. Haskell, 47 N. H. 479; 93 Am. Dec. 455; Snow v. Starr, 75 Tex. 411; Pierce v. Robert, 57 Conn. 31; Mueller v. Relhan, 94 Ill. 142; Miller v. Ternane, 50 N. J. L. 32; Dow v. Jewell, 18 N. H. 340; 45 Am. Dec. 371, 381 and note.

4, Jackson v. Bard, 4 Johns. 230; 4 Am. Dec. 267.

§ 241. **Same, continued.**—The conduct and declarations of the grantor, before the conveyance, respecting the estate conveyed, which tend to prove a fraudulent intention on his part, are proper upon an inquiry into the validity of such conveyance by a creditor or subsequent purchaser who alleges it to be fraudulent.¹ So admissions made by one, who at the time held the legal title, to the effect that he had contracted by parol to sell the same to another and had received the pay therefor are competent evidence against all persons claiming title under or through him.² The principle upon which such evidence is received is that the declarant was so situated that he probably knew the truth, and his interests were such that he would not have made the admissions to the prejudice of his title or possession, unless they were true. The regard which one so situated would have to his interest is considered sufficient security against falsehood.³ But in such a case there must be proof of notice to the grantee of such fraudulent intent.⁴ On the same principle the declarations of the grantor are admissible against the vendee to show that his possession was not adverse;⁵ or to show the source of title, and that the grantor had only a life estate;⁶ that another person of the same name had the legal title,⁷ or the equitable title;⁸ that he held as trustee merely, even though he be alive at the time

of trial;⁹ that there was a mistake in the deed;¹⁰ or a statement in disparagement of a homestead interest,¹¹ or one limiting his boundaries,¹² or one as to the limits of a highway,¹³ if such statements are prejudicial to his interests or that in purchasing at a tax sale he purchased as the agent of another.¹⁴ In a contest as to the location of the boundaries of a tract of land, declarations made by a deceased owner thereof, while in possession, as to the corners and lines are admissible. Such declarations may operate as mere admissions or, if the proper foundation is laid, as estoppels *in pais*.¹⁵

1, Jackson v. Myers, 11 Wend. 533; Bridge v. Eggleston, 14 Mass. 245; 7 Am. Dec. 209; Visser v. Webster, 8 Cal. 109; Hoose v. Robins, 18 La. An. 648; Wadsworth v. Williams, 100 Mass. 126; Ewing v. Gray, 12 Ind. 64; Alexander v. Caldwell, 55 Ala. 517; Tibbals v. Jacobs, 31 Conn. 428; Robinson v. Pitzer, 3 W. Va. 335; Venable v. United States Bank, 2 Peters 107; Pettibone v. Phelps, 13 Conn. 445; 35 Am. Dec. 88; Guidry v. Givot, 2 Mart. N. S. (La.) 13; 14 Am. Dec. 193; Beach v. Catlin, 4 Day (Conn.) 284; 4 Am. Dec. 221; Foster v. Hall, 12 Pick. 89; 22 Am. Dec. 400; Chadwick v. Fonner, 69 N. Y. 404; Reichart v. Castator, 5 Binn. (Pa.) 109; 6 Am. Dec. 402. See extended note on this general subject in 42 Am. Dec. 631.

2, Chadwick v. Fonner, 69 N. Y. 404.

3, Chadwick v. Fonner, 69 N. Y. 404.

4, Bridge v. Eggleston, 14 Mass. 245; 7 Am. Dec. 209; Den *ex dem.* Pickett v. Pickett, 3 Dev. (N. C.) 6. For the application of the rule as against a sub-vendee, see Taylor v. Webb, 51 Miss. 36.

5, Betts v. Davenport, 3 Conn. 286.

6, Dooley v. Barnes, 86 Va. 644.

- 7, McDuffie v. Clark, 39 Hun 166.
- 8, Walker v. Elledge, 65 Ala. 51.
- 9, Giblehouse v. Strong, 3 Rawle (Pa.) 437.
- 10, Allen v. McGaughly, 31 Ark. 252.
- 11, Anderson v. Kent, 14 Kan. 207.
- 12, Flagg v. Mason, 141 Mass. 64. See also note, 15 Am. Dec. 628.
- 13, State v. Vale Mills, 63 N. H. 4.
- 14, Baucum v. George, 65 Ala. 259.
- 15, Gratz v. Beates, 45 Pa. St. 495; Daggett v. Shaw, 5 Met. 223; Weidman v. Kohr, 4 Serg. & R. (Pa.) 174; Davis v. Jones, 3 Head (Tenn.) 603; Hurt v. Evans, 49 Tex. 311. See also extended note, 95 Am. Dec. 70.

§ 242. **Same — Limitations upon the rule.**—It may be stated more generally that when one person takes an estate as successor to another, claiming under him, he takes such estate *cum onere*. The rule has often been stated that in such cases the declarations of the grantor against his title, while in possession of the premises, are always admissible, not only against him, but against those who claim under him.¹ It is not necessary, when the declarant is living, to call him as a witness; his statements may be shown by third persons.² But the declarations of the grantor are not to be treated as admissions, and are *not competent, if made before his interest in the property in question was acquired,*³ or after he has conveyed it away, since the acts and declarations of the grantor after he has divested himself of his estate cannot be ad-

mitted to impeach the title of the grantee,⁴ unless there is proof of collusion or of some fraudulent scheme between the grantor and grantee.⁵ If, however, such admissions are made by the grantor in the *presence of the grantee*, they are competent.⁶ If the grantee permits the grantor to remain in possession after the conveyance, the declarations of the latter as to the nature of his possession and as to the good faith of the transaction are admissible.⁷ Another limitation upon the admission of testimony of this character is that it should not be received to *contradict the terms of written instruments*, as, for example, to vary the tenor of a deed or destroy the record title.⁸ But declarations are received for the purpose of qualifying or showing the nature of the possession when they are in disparagement of the declarant's title.⁹

1, Beers v. Hawley, 2 Conn. 467; Davis v. Pierce, 2 T. R. 53; Downs v. Lyman, 3 N. H. 486; Reed v. Dickey, 1 Watts (Pa.) 152; Jackson v. Myers, 11 Wend. 533; Norton v. Pettibone, 7 Conn. 319; 18 Am. Dec. 116; Jackson v. Davis, 5 Cow. 123; 15 Am. Dec. 454; Padgett v. Lawrence, 10 Paige (N. Y.) 170; 40 Am. Dec. 232; Hays v. Hays, 66 Tex. 606; Simpson v. Dix, 131 Mass. 179.

2, Jackson v. Myers, 11 Wend. 533.

3, Eckert v. Cameron, 43 Pa. St. 120; Stockwell v. Blamey, 129 Mass. 312. See also extended note, 42 Am. Dec. 631. See sec. 355 *et seq. infra*.

4, Stockwell v. Blamey, 129 Mass. 312; Noyes v. Morrill, 108 Mass. 396; Chase v. Horton, 143 Mass. 118; Pringle v. Pringle, 59 Pa. St. 281; Chadwick v. Fonner, 69 N. Y. 404; Randegger v. Ehrhardt, 51 Ill. 101; Carpenter v. Carpenter,

8 Bush (Ky.) 283; Taylor v. Webb, 54 Miss. 36; Howell v. Howell, 47 Ga. 492; Hills v. Ludwig, 46 Ohio St. 373; Holbrook v. Holbrook, 113 Mass. 74; Cost v. Fry, 33 W. Va. 449; Bellville v. Jones, 74 Tex. 148; Price v. Branch Bank, 17 Ala. 374; Hutchins v. Castle, 48 Cal. 152; Derby v. Gallup, 5 Minn. 119; Brashear v. Burton, 3 Bibb (Ky.) 9; 6 Am. Dec. 634; Sharp v. Wycliffe, 3 Litt. (Ky.) 10; 14 Am. Dec. 37; Steward v. Thomas, 35 Mo. 202; Padgett v. Lawrence, 10 Paige 170; 40 Am. Dec. 232; Bixby v. Carskaddon, 70 Iowa 726; McLaughlin v. McLaughlin, 91 Ia. St. 462; Barrett v. French, 1 Conn. 354; 6 Am. Dec. 241; Hatch v. Straight, 3 Conn. 31; 8 Am. Dec. 152; Osgood v. Manhattan Co., 3 Cow. 612; 15 Am. Dec. 304; Chess v. Chess, 1 Pen. & W. (Pa.) 32; 21 Am. Dec. 350; Doe *ex dem* Maxwell v. Moore, 4 Blackf. (Ind.) 445; 30 Am. Dec. 666. See note, 42 Am. Dec. 632.

5, Hartman v. Diller, 62 Pa. St. 37; Boyd v. Jones, 60 Mo. 454; Pier v. Duff, 63 Pa. St. 59; Cuyler v. McCartney, 33 Barb. 165; 40 N. Y. 221; Daniels v. McGinnis, 97 Ind. 549; Kennedy v. Divine, 77 Ind. 490. See note, 42 Am. Dec. 633.

6, See cases cited in note 4 *supra*.

7, Pier v. Duff, 63 Pa. St. 59; Osgood v. Eaton, 63 N. H. 355; Creighton v. Hoppis, 99 Ind. 369. See also, Vrooman v. King, 36 N. Y. 477.

8, Dodge v. Freedman's Sav. Co., 93 U. S. 379; Doe v. Webster, 12 Adol. & Ell. 442; Hancock Ins. Co. v. Moore, 34 Mich. 41; Stone v. O'Brien, 7 Col. 458; Mooring v. McBride, 62 Tex. 309. See sec. 206 *et seq. supra*.

9, Roberts v. Roberts, 82 N. C. 29; Melvin v. Bellard, 82 N. C. 33. See sec. 355 *et seq. infra*.

§ 243. Admissions of ancestor against heir.—The principle under discussion has often been applied in the admission of the declarations of ancestors as against their heirs. Thus, the admissions of an ancestor may be

shown against the heir to prove the contents of a lost deed,¹ or to establish a boundary,² or a gift,³ or to show that the ancestor had made a parol contract to sell, if such evidence would have been admissible against him while living.⁴ "The declarations of the ancestor that he held the land as the tenant of a third person are admissible to show the seisin of that person in an action brought by him against the heir for the land."⁵ Where heirs claim that their ancestor held land under a parol agreement, his statements to the contrary are admissible against the heirs,⁶ and so where a deed is executed on conditions providing for the proper support of the grantor, his statements admitting compliance with the conditions are competent as against his heir who claims that the conditions were not fulfilled.⁷ Stating the rule more broadly, it has been held that whenever the admissions of an ancestor would be admissible against him, if living, they are admissible against an heir claiming under him by descent, and are receivable in evidence against him in the same manner as they would have been receivable against the ancestor.⁸ In the same manner the admissions of a *devisor* are competent against his devisee, those of an *intestate* against his administrator and those of a *testator* against his executor.⁹ Thus, in an action by an administrator against the widow of his intestate for the conversion of

property, declarations of the intestate that the property was not his are admissible for the defendant.¹⁰ So the admissions of a testator that his tenant was to pay no rent are admissible against his executor.¹¹ The declarations of a deceased person, not a part of the *res gestae*, are not competent to show whether the property in question was given as a gift or as an advancement, as the deceased, while alive, would in no way be affected by the determination of the question.¹²

1, Allen's Lessee v. Parish, 3 Ohio 107.

2, Jackson v. McCall, 10 Johns. 377; 6 Am. Dec. 343; Marron v. Hoyt, 72 Ga. 117; Flagg v. Mason, 141 Mass. 64. See notes, 60 Am. Rep. 589; 15 Am. Dec. 628.

3, Pritchard v. Pritchard, 69 Wis. 373.

4, Chadwick v. Fonner, 69 N. Y. 404.

5, 1 Greenl. Ev. sec. 189; Doe v. Pettett, 5 Barn. & Ald. 223; McFadden v. Ellmaker, 52 Cal. 348; Foote v. Beecher, 78 N. Y. 155; Lewis v. Adams, 61 Ga. 559.

6, Baird v. Slight, 62 Hun 603.

7, Spaulding v. Hallenbeck, 35 N. Y. 204.

8, 1 Greenl. Ev. sec. 189; Davis v. Melson, 66 Iowa 189.

9, Childs v. Jordan, 106 Mass. 321; Slade v. Leonard, 75 Ind. 171; Mueller v. Rebhan, 94 Ill. 142. For a fuller discussion of declarations by testators, see secs. 489, 492 *et seq. infra*.

10, Fellows v. Smith, 130 Mass. 378.

11, Cox v. Baird, 11 N. J. L. 105; 19 Am. Dec. 386.

12, Thistlewaite v. Thistlewaite, 132 Ind. 355.

§ 244. Admissions — Landlord and tenant.— A similar relation of privity exists between landlord and tenant. Thus, the parol declarations of a party showing a deed of real estate held by him to be void for fraud are admissible in evidence in an action of ejectment against his tenant, where such declarations were made while in possession of the property.¹ When the relation of landlord and tenant is once established, it attaches to all who may succeed the tenant, immediately or remotely; and the succeeding tenant is as much affected by the acts and acknowledgments of his predecessor as though they were his own.² But the declarations of the tenant are not admissible to affect the title of the landlord, unless such declarations are brought to the notice of the landlord in such a way as to tend to establish a reputation of the tenancy.³ Nor is the remainderman affected by the declarations of the tenant for life as there is no privity between them; and the statements of the tenant for years are not admissible against the owner in fee.⁴

1, Jackson v. Myers, 11 Wend. 533; Jackson v. Davis, 5 Cow. 123.

2, Jackson v. Davis, 5 Cow. 123; Crease v. Barrett, 1 Crompt., M. & R. 919.

3, Ingram v. Little, 14 Ga. 173; 58 Am. Dec. 549; Scholes v. Chadwick, 2 Moody & Rob. 507; Papendick v. Bridgewater, 5 El. & B. 166; Tickle v. Brown, 4 Adol. & Ell. 378; Hanley v. Erskine, 19 Ill. 265.

4, Hill v. Roderick, 4 Watts & S. (Pa.) 221; Pool v. Morris, 29 Ga. 374; 74 Am. Dec. 68.

§ 245. Admissions by former owners of personal property.—The same principle is often applied respecting the admissions of former owners of personal property. The admissions or declarations of the assignor, vendor or holder of personal property, made before the sale, assignment or other disposal of his interest, are evidence against his vendee, assignee or other person claiming under him, immediately or remotely, either by act and operation of law, or by the acts of the parties. And his declarations, with regard to his rights and liabilities, are in like manner evidence against any one coming into ~~his~~ place after such declarations are made, or representing him in respect to such rights and liabilities.¹ There have been many cases in which the declarations of the vendor of chattels in possession, admitting that he had parted with his title or that there were defects in his title, have been received against a purchaser from him. Such declarations have been received on the ground that such a privity existed between the seller and the buyer that the latter stands in the situation of the former and is chargeable with the same admissions which might have been offered against him.² There are instances in which the declarations of former owners of personal property have been held inadmissible on the ground that they were still living and might be produced in court.³ But such cases seem

to be based upon a misapprehension of the principle which make these declarations competent, which is the privity of the person against whom they are offered with the declarant. Their admissibility by no means depends upon the principle involved in that exception to hearsay by which the declarations against interest of persons since deceased are admitted.⁴

1, *Horton v. Smith*, 8 Ala. 73; 42 Am. Dec. 628, 630 and note; *Levy v. Holburg*, 67 Miss. 526; *People v. Vernon*, 35 Cal. 49; 95 Am. Dec. 49 and note. See also notes, 42 Am. Dec. 80, 631. See sec. 246, 354, *infra*.

2, *Guy v. Hall*, 3 Murph. (N. C.) 150; *Johnson v. Patterson*, 2 Hawks (N. C.) 83; 11 Am. Dec. 756; *Coale v. Harrington*, 7 Harr. & J. (Md.) 147; *Horton v. Smith*, 8 Ala. 73; 42 Am. Dec. 628; *Barnes v. Mobley*, 21 Ala. 232; *Bond v. Fitzpatrick*, 4 Gray 89; *Bowie v. Hunter*, 4 Cranch C. C. 699; *Vennum v. Thompson*, 38 Ill. 143; *Fellows v. Smith*, 130 Mass. 378; *Bunberry v. Brett*, 18 Ind. 343; *Parker v. Marston*, 34 Me. 386; *Fisher v. True*, 38 Me. 534; *McLanathan v. Patten*, 39 Me. 142; *Land v. Lee*, 2 Rich. L. (S. C.) 168; *Walker v. Marseilles*, 70 Miss. 263. Contra, *Paige v. Cagwin*, 7 Hill 361; 42 Am. Dec. 68. On this general subject see extended note, 42 Am. Dec. 80.

3, *Coit v. Howd*, 1 Gray 547.

4, *Guy v. Hall*, 3 Murph. (N. C.) 150; *Gibblehouse v. Strong*, 3 Rawle (Pa.) 437; *Haddan v. Mills*, 4 Car. & P. 486; *Crayton v. Collins*, 2 McCord (S. C.) 457; *Snelgrove v. Martin*, 2 McCord (S. C.) 241. As to declarations of this character, see secs. 327 *et seq. infra*.

§ 246. Same—Real and personal property.—It is to be observed that the rule does not admit the declarations of the seller in such cases, unless the person against whom

the declaration is offered does in fact hold title under him.¹ And of course admissions are not to be received as to the title of either real or personal property if made *after the sale*, as the vendor cannot disparage a title with which he has already parted,² unless, as we have already seen in the case of the sale of real estate, the seller remains in possession,³ or unless there is other evidence tending to show *collusion* or a combination to defraud.⁴ But where it is claimed that there is concert or collusion between the vendor and vendee to defraud creditors, the subsequent declarations of the vendor are not admissible against the vendee on that ground, "unless the alleged common purpose to defraud is first established by independent evidence and unless they have such relation to the execution of that purpose that they fairly constitute a part of the *res gestae*."⁵ The rule also renders the declarations of assignors,⁶ grantors,⁷ devisors⁸ and others through whom title is claimed⁹ incompetent, if made after the title or interest in the property in question has passed from them.

1, Watson v. Williams, 1 Harp. (S. C.) 447.

2, Minor v. Phillips, 42 Ill. 123; Hessing v. McCloskey, 37 Ill. 341; Gray v. Earl, 13 Iowa 188; Keystone Mfg. Co. v. Johnson, 50 Iowa 142; Lee v. Huntoon, 1 Hoff. Ch. (N. Y.) 447; Buckingham v. Tyler, 74 Mich. 101; Farmers' Loan & Trust Co. v. Montgomery, 30 Neb. 33; Holmes v. Roper, 141 N. Y. 64; Lewis v. Rice, 61 Mich. 97; Horton v. Smith, 8 Ala. 73; 42 Am. Dec. 628 and note; Beard v.

First Nat. Bank, 41 Minn. 153; Roberts v. Medberry, 132 Mass. 100; Farrar v. Snyder, 31 Mo. App. 93; Garlich v. Bowers, 66 Cal. 122; Walden v. Purves, 73 Cal. 518; Bunker v. Green, 48 Ill. 243; Davies v. Belden, 46 Vt. 674; Roberts v. Medberry, 132 Mass. 100; Sanford v. Ellithorp, 95 N. Y. 48; McLaughlin v. McLaughlin, 91 Pa. St. 462; Hall v. Ludwig, 46 Ohio St. 513; Bentley v. O'Brien, 111 Ill. 53. See note, 42 Am. Dec. 632.

3, Marsh v. Hampton, 5 Jones (N. C.) 382; Gregory v. Frothingham, 1 Nev. 253; Grant v. Lewis, 14 Wis. 487; Gidney v. Logan, 79 N. C. 214; Selsby v. Redlon, 19 Wis. 17. See note, 42 Am. Dec. 633; sec. 242 *supra*.

4, Waterbury v. Sturtevant, 18 Wend. 353; Neal v. Peden, 1 Head (Tenn.) 546; Cuyler v. McCartney, 33 Barb. 165; O'Neil v. Glover, 5 Gray 144; Souder v. Schechterly, 91 Pa. St. 83; Boyd v. Jones, 60 Mo. 454; Hartman v. Diller, 62 Pa. St. 37; Price v. Junkin, 4 Watts (Pa.) 82; 28 Am. Dec. 685. See note, 42 Am. Dec. 633.

5, Winchester v. Creary, 116 U. S. 161; Holbrook v. Holbrook, 113 Mass. 74; Hirshfield v. Williamson, 18 Nev. 66.

6, Alger v. Andrews, 47 Vt. 238; Myers v. Kinzie, 26 Ill. 36; Wynne v. Glidevell, 17 Ind. 446; Heywood v. Reed, 4 Gray 574; Frear v. Evertson, 20 Johns. 142; Maddox v. Atlantic & N. C. Ry. Co., 115 N. C. 624.

7, Alexander v. Caldwell, 55 Ala. 517; Gallagher v. Williamson, 23 Cal. 331; McFadden v. Ellmaker, 52 Cal. 348; State v. Mills, 63 N. H. 4; Hale v. Rich, 48 Vt. 217; Dodge v. Freedman's Trust Co., 93 U. S. 379.

8, Mueller v. Rebhan, 94 Ill. 142; McSweeney v. McMillan, 96 Ind. 298; Wentworth v. Wentworth, 71 Me. 72.

9, Eckert v. Triplett, 48 Ind. 174, declarations of a former deceased administrator; Pickering v. Reynolds, 119 Mass. 111, suit between an occupier of land and a creditor.

§ 247. Same—Strict rules in some jurisdictions.—In some jurisdictions a much stricter rule prevails with respect to

the admission of the declarations of a former owner of chattels to impeach the title of the purchaser. For example, in the state of New York the rule has prevailed since the decision of the court in the leading case of *Paige v. Cagwin*, that the declarations of a vendor of chattels or of a prior holder of negotiable paper are not admissible against a subsequent purchaser for value, unless they are made by the real party in interest or by one through whom the party claims as a privy by representation, as in cases of bankruptcy, death and others of a similar character. The authorities holding this view maintain that where a person becomes a purchaser of a chose in action or a chattel for a valuable consideration his rights are independent of the assignor and beyond his control; that although it may be necessary to found his title on a transfer, yet the mere proof of such transfer is evidence of his right, and that possession alone is *prima facie* evidence of title and the rights of the possessor do not necessarily depend on the title of the person by whom the delivery was made or from whom the possession was obtained.¹ But in the early New York cases the declarations of the former owner are held admissible against those who hold under him in a *representative capacity*, as administrators and assignees in bankruptcy,² as well as in those cases where the transaction relates to real estate.³

1, *Paige v. Cagwin*, 7 Hill 361; 42 Am. Dec. 68 and note; *Tousley v. Barry*, 16 N. Y. 497; *Von Sachs v. Kretz*, 72 N. Y. 553; *Truax v. Slater*, 86 N. Y. 630. The same rule has been endorsed by the federal supreme court, *Dodge v. Freedman's Trust Co.*, 93 U. S. 379. In Alabama such declarations are rejected unless part of the *res gestae* explaining the possession, *Nelson v. Iverson*, 17 Ala. 216; *Hadden v. Powell*, 17 Ala. 314; *Thompson v. Mawhinney*, 17 Ala. 362; 52 Am. Dec. 176; *Price v. Bank*, 17 Ala. 374; *Weaver v. Yeatmans*, 15 Ala. 539.

2, *Brown v. Mailler*, 12 N. Y. 120; *Hackney v. Vrooman*, 62 Barb. 666; *Von Sachs v. Kretz*, 72 N. Y. 553; *Smith v. Sergeant*, 67 Barb. 250; *Clews v. Kehr*, 90 N. Y. 633.

3, *Chadwick v. Fonner*, 69 N. Y. 404.

§ 248. Same — Declarations of former owners of choses in action.— On well-known grounds the declarations of a former owner of negotiable paper are not admissible against one who purchased for value before due.¹ But with this exception the same general principle stated in a former section governs in respect to choses in action; and the declarations of the assignor made while he is owner are admissible against the assignee and those claiming under him.² This has often been illustrated in the case of negotiable paper transferred after it became due, where the declarations of former owners have been received to show payment or rights of set-off,³ want of consideration or want of title,⁴ and other defenses.⁵

1, This is too elementary to require the citation of authorities.

2, Snelgrove v. Martin, 2 McCord (S. C.) 241; Land v. Lee, 2 Rich. L. (S. C.) 168; Guy v. Hall, 3 Murph. (N. C.) 150; Brindle v. McIlvaine, 10 Serg. & R. (Pa.) 282; Caldwell v. Gamble, 4 Watts (Pa.) 292; Kellogg v. Krauser, 14 Serg. & R. (Pa.) 137; 16 Am. Dec. 480; Williams v. Judy, 3 Gilm. (Ill.) 282; 44 Am. Dec. 699; Sandifer v. Hoard, 59 Ill. 246; Merrick v. Parkman, 18 Me. 407; Alger v. Andrews, 47 Vt. 238; Magee v. Raiguel, 64 Pa. St. 1101; Bond v. Fitzpatrick, 4 Gray 89; Randegger v. Ehrhardt, 51 Ill. 101; Stark v. Boswell, 6 Hill 405; 41 Am. Dec. 752 and note; Ginter v. Breeden, 90 Va. 565.

3, Bond v. Fitzpatrick, 4 Gray 89; Reed v. Vancleve, 3 Dutch. (N. J.) 352; 72 Am. Dec. 369.

4, Coster v. Symons, 1 Car. & P. 148; Snelgrove v. Martin, 2 McCord (S. C.) 241; Haddan v. Mills, 4 Car. & P. 486.

5, Kent v. Lowen, 1 Camp. 177; Kane v. Torbitt, 23 Ill. App. 311; Hanchett v. Kimbark, 118 Ill. 121.

249. Declarations of persons having a joint interest—Partners.—In a suit by or against several persons who are proved to have a joint interest in the decision, a declaration made by one of them, while engaged in the joint business, concerning a material fact within his knowledge is evidence against him and against all who are parties with him in the suit.¹ This principle is often illustrated in respect to the declarations of *partners*. Thus, if the action is against partners to recover money alleged to have been obtained by false representations, the statements of either partner, made during the partnership relative to and tending to establish the cause of the action, are admissible against both;² and entries in the partnership books

made by one partner during the continuance of partnership are admissible against both.³ In like manner the admissions of one partner have been held admissible against all to prove the execution of a promissory note,⁴ the genuineness of such note,⁵ the existence of other forms of indebtedness,⁶ the financial condition of the firm,⁷ the payment of money,⁸ the ownership of goods in possession of the firm⁹ and the authority of an agent.¹⁰ The admissions of a partner are also competent to prove that a note made in the firm name was given on credit of the firm and not on individual credit;¹¹ that due notice had been given of the dishonor of a bill,¹² and that the partners are liable as garnishees.¹³ It was, also held competent in an action by an insurance company to recover moneys paid on fraudulent proofs of loss to prove by such an admission that one partner had set a fire.¹⁴ Although one partner is shown to be *hostile* to another, such admissions may be received although, of course, this hostility may affect the question of credibility.¹⁵ The admissions of one partner are not received against another on the ground that they are parties to the record, but on the ground that they are identified in interest, and that *each is agent for the other*, and that the acts and declarations of one during the existence of the partnership, while transacting its business and within the scope of the business, are evidence against the others. The

declarations of a *dormant* partner, relating to the partnership business, are admissible against his co-partners,¹⁶ and those of a *deceased* partner are admissible against his survivors.¹⁷

1, *Rex v. Hardwick*, 11 East 589; *Walling v. Rosevelt*, 16 N. J. L. 41; *Armstrong v. Farrar*, 8 Mo. 627; *Hurst v. Robinson*, 13 Mo. 82; 53 Am. Dec. 134; *Irby v. Brigham*, 9 Humph. (Tenn.) 750; *Steph. Ev. art. 17*; 1 *Greenl. Ev. sec. 172*. But see, *Dean v. Ross*, 105 Cal. 227. As to admissions of partner see note, 20 L. R. A. 595-599; also article by Stewart Rapalje, 26 Cent. L. Jour. 491, citing many cases.

2, *Western Assurance Co. v. Towle*, 65 Wis. 247.

3, *Walden v. Sherburne*, 15 Johns. 409.

4, *Adams v. Brownson*, 1 Tyler (Vt.) 452.

5, *Henslee v. Camefes*, 49 Mo. 295.

6, *Corps v. Robinson*, 2 Wash. C. C. 388.

7, *Doremus v. McCormick*, 7 Gill (Md.) 49.

8, *Munson v. Wickwire*, 21 Conn. 513.

9, *Humes v. O'Brien*, 74 Ala. 64.

10, *Odiosne v. Maxcy*, 15 Mass. 39.

11, *Hurd v. Hagerty*, 24 Ill. 171.

12, *Myers v. Standart*, 11 Ohio St. 29.

13, *Anderson v. Wanzer*, 6 Miss. 587; 37 Am. Dec. 170.

14, *Western Assurance Co. v. Towle*, 65 Wis. 245.

15, *Webster v. Stearns*, 44 N. H. 498; *Wood v. Braddock*, 1 Taunt. 104; *Nicholls v. Dowding*, 1 Stark. 81; *Wright v. Court*, 2 Car. & P. 232; *Rapp v. Latham*, 2 Barn. & Ald. 795; *Corps v. Robinson*, 2 Wash. C. C. 388; *Jemison v. Minor*, 34 Ala. 33; *Talbot v. Wilkins*, 31 Ark. 411; *Munson v. Wickwire*, 21 Conn. 513; *Drumright v. Philpot*, 16 Ga. 424; 60 Am. Dec. 738; *Hurd v. Haggerty*,

24 Ill. 171; Boor v. Lowrey, 103 Ind. 468; Wiley v. Griswold, 41 Iowa 375; Boyce v. Watson, 3 J. J. Marsh. (Ky.) 498; Fickett v. Swift, 41 Me. 65; Harryman v. Roberts, 52 Md. 64; 20 Am. Law Reg. (N. S.) 373; Collett v. Smith, 143 Mass. 473; Burgan v. Lyell, 2 Mich. 102; 55 Am. Dec. 53; Faler v. Jordan, 44 Miss. 283; Cady v. Kyle, 47 Mo. 346; Gulick v. Gulick, 14 N. J. L. 578; Fogerty v. Jordan, 2 Rob. (N. Y.) 319; Hilton v. McDowell, 87 N. C. 364; Western Assurance Co. v. Towle, 65 Wis. 247.

16, Kaskaskia Bridge Co. v. Sherman, 1 Gilm. (Ill.) 15; Weed v. Kellogg, 6 McLean (U. S.) 44.

17, Doremus v. McCormick, 7 Gill (Md.) 49. As to declarations of a surviving partner, see McElroy v. Ludlum, 32 N. J. Eq. 828.

§ 250. Same — Statutes of limitation as affecting admissions of partners. — The rule formerly prevailed in England and was adopted in some states in this country, that a debt might be revived against the other partners by a payment by one, which was held to constitute an admission of the debt. This was held even after the statute of limitations had run and after the dissolution of the partnership had taken place.¹ This view rested upon the theory that the statute of limitations is founded upon a *presumption of payment* of the debt after the statutory period, and that this presumption was sufficiently rebutted by an acknowledgment or admission of the debt by one of the joint debtors.² Another theory is that the statute of limitations is not founded on the presumption of payment, but that it rests on grounds of *public policy*, — that it is a statute of repose

intended to prevent the prosecution of stale demands, and that the debt can only be revived by a new promise. It is further urged that after the dissolution of the partnership, although each partner has authority to dispose of the partnership property, and to collect and pay partnership debts and to settle partnership affairs, yet he *can not be presumed to be the agent* of the others to bind them by a new contract, and that the admission or new promise can bind no one but himself.³ This is the view which is now sustained by the weight of authority, and which has now been adopted by statute in England and in some of the states of this country.⁴ It has been held in some cases that an admission of one partner may suspend the running of the statute or prolong the time as against the rest, but that it cannot revive their liability after it has been once extinguished.⁵ But the weight of authority sustains the view that *after actual dissolution* neither partner can be deemed the agent of the others to the extent of binding them to pay a debt by any payment or promise which he may make.⁶

1, Whitcomb v. Whiting, Doug. 652; Wood v. Braddick, 1 Taunt. 104; Bridge v. Gray, 14 Pick. 55; 25 Am. Dec. 358; Simpson v. Geddes, 2 Bay (S. C.) 533; Garland v. Agee, 7 Leigh. (Va.) 362; Buxton v. Edwards, 134 Mass. 567; Merritt v. Day, 38 N. J. L. 32; 20 Am. Rep. 362; Bissell v. Adams, 35 Conn. 299; Beadsley v. Hall, 36 Conn. 270; 4 Am. Rep. 74; Shepley v. Waterhouse, 22 Me. 497; Wheelock v. Doolittle, 18 Vt. 440. See note, 6 Am. Dec. 574-576

2, On the general subject of this section see valuable discussion in 1 Smith L. C. 982 *et seq.* See also cases last cited.

3, See extended notes, 6 Am. Dec. 574-575; 40 Am. St. Rep. 566; 15 L. R. A. 656. See cases next cited.

4, See the statutes of the jurisdiction. See also, *Bell v. Morrison*, 1 Peters 351; *Faulkner v. Bailey*, 123 Mass. 588; *Bailey v. Corliss*, 51 Vt. 366; *Rogers v. Anderson*, 40 Mich. 290; *Van Keuren v. Parmelee*, 2 N. Y. 523; 51 Am. Dec. 322; *Walsh v. Kane*, 4 La. An. 533; *Kauffman v. Fisher*, 3 Grant Cas. (Pa.) 302; *Reppert v. Colvin*, 48 Pa. St. 248; *Clementson v. Williams*, 8 Cranch 72; *Exeter Bank v. Sullivan*, 6 N. H. 124; *Muse v. Donelson*, 2 Humph. (Tenn.) 166; 36 Am. Dec. 309; *Dickerson v. Turner*, 12 Ind. 223; *Lowther v. Chappell*, 8 Ala. 353; 42 Am. Dec. 643; *Levy v. Cadet*, 17 Serg. & R. (Pa.) 126; 17 Am. Dec. 650; *Briscoe v. Anketell*, 28 Miss. 361; 61 Am. Dec. 553; *Palmer v. Dodge*, 4 Ohio St. 21, 36; 62 Am. Dec. 271; *Myatts v. Bell*, 41 Ala. 222; *Bush v. Stowell*, 71 Pa. St. 208; 10 Am. Rep. 694; *Kallenbach v. Dickinson*, 100 Ill. 427; 39 Am. Rep. 47; *Mayberry v. Willoughby*, 5 Neb. 368; 25 Am. Rep. 491; *Steele v. Souder*, 20 Kan. 39; *Tate v. Clements*, 16 Fla. 339, 26 Am. Rep. 709.

5, *Steele v. Jennings*, 1 McMull. (S. C.) 297; *Silman v. Silman*, 2 Hill (S. C.) 416; *Goudy v. Gillam*, 6 Rich. L. (S. C.) 28; *Schindel v. Gates*, 46 Md. 604; 24 Am. Rep. 526; *Walton v. Robinson*, 5 Ired. (N. C.) 341; *Ellicott v. Nichols*, 7 Gill (Md.) 85; 48 Am. Dec. 546; *Emmons v. Overton*, 18 B. Mon. (Ky.) 643; *Burr v. Williams*, 20 Ark. 171. See also *Kallenbach v. Dickinson*, 100 Ill. 427; 39 Am. Rep. 47.

6, *Kelley v. Sanborn*, 9 N. H. 46; *Pickett v. Leonard*, 34 N. Y. 175; *Van Keuren v. Parmelee*, 2 N. Y. 523; 51 Am. Dec. 322; *Levy v. Cadet*, 17 Serg. & R. (Pa.) 126; 17 Am. Dec. 650; *Steele v. Jennings*, 1 McMull (S. C.) 297; *Lefavour v. Yandes*, 2 Blackf. (Ind.) 240, 371; *Brewster v. Hardeman*, Dud. (Ga.) 138; *Green v. Baird*, 53 Ill. App. 211; *Belote v. Wynne*, 7 Yerg. (Tenn.) 534; *Watson v. Woodman*, L. R. 20 Eq. 721; *Myatts v. Bell*, 41 Ala. 222; *Curry v. White*, 51 Cal. 530; *Tate v. Clements*, 16 Fla. 339; 26 Am. Rep. 709; *Leit-*

ausser v. Baumeister, 47 Minn. 151; Carroll v. Gayarre, 15 La. An. 671; Sigler v. Platt, 16 Mich. 206; Kerper v. Wood, 48 Ohio St. 613; Haddock v. Crocheron, 32 Tex. 276; 5 Am. Rep. 244; Carlton v. Woolen Mills, 27 Vt. 496; Conrad v. Buck, 21 W. Va. 396; Cronkhite v. Herrin, 15 Fed. Rep. 888; Muse v. Donelson, 2 Humph. (Tenn.) 166; 36 Am. Dec. 309. See note, 1 Smith L. C. 1022 and cases; Bates Part. sec. 704. In some cases the question of notice of the dissolution to the payee has been held material, Clement v. Clement, 69 Wis. 599; Gates v. Fisk, 45 Mich. 522; Kinniston v. Avery, 16 N. H. 117; 57 Buxton v. Edwards, 134 Mass. 567; Davidson v. Harmon, 57 Minn. 355.

§ 251. Admissions after dissolution of partnership.—While it is clear that the admissions of one partner are binding upon the others so far as his statements are necessary to the proper winding up of the partnership affairs and so far as made while he is acting as agent for that purpose, yet there has been much conflict of opinion upon the question whether admissions of one partner respecting former transactions, made after the dissolution, are admissible against the co-partners. As we have already seen, under the early English doctrine the powers of a partner to bind the firm by admissions or even by new promises were not limited to the duration of the partnership.¹ But in this country the tendency of the authorities has been to *restrict the power* within much narrower limits and to deny the power of one partner to charge his co-partners by his admissions, after dissolution, as to past transactions.² In most of the American cases where

the declarations of one partner have been received against other partners, such declarations related to transactions occurring during the existence of the partnership which established the amount, nature or continued existence of the claim, but did not create a new liability.³ Many of the cases on this subject have related to the adjustments of accounts by one partner after the dissolution of the partnership. In such cases the statements may be admitted as part of the *res gestae*, but by the weight of authority when the admission, made after the dissolution, is not part of some act which the person is authorized to do, it is not admissible as against any person except himself.⁴

1, 1 Phil. Ev. (3d ed.) p. 379. On this general subject see extended note, 40 Am. St. Rep. 554; see sec. 250 *supra*.

2, *Bispham v. Patterson*, 2 McLean (U. S.) 87; *Thompson v. Bowman*, 6 Wall. 316; *Currie v. White*, 51 Cal. 530; *Brewster v. Hardeman*, Dud. (Ga.) 138; *Winslow v. Newlan*, 45 Ill. 145; *Hamilton v. Summers*, 12 B. Mon. (Ky.) 11; 54 Am. Dec. 509; *Conery v. Hayes*, 19 La. An. 325; *Ostrom v. Jacobs*, 9 Met. 454; *Maxey v. Strong*, 53 Miss. 280; *Brady v. Hill*, 1 Mo. 315; 13 Am. Dec. 503; *Hackley v. Patrick*, 3 Johns. 536; *Pringle v. Leverich*, 97 N. Y. 181; 49 Am. Rep. 522; *Hogg v. Orgill*, 34 Pa. St. 344; *Miller v. Neimerick*, 19 Ill. 162; *Walker v. Duberry*, 1 A. K. Marsh. (Ky.) 189; *Daniel v. Nelson*, 10 B. Mon. (Ky.) 316; *Pennoyer v. David*, 8 Mich. 407; *Flowers v. Hellen*, 29 Mo. 324; *Flannagin v. Champion*, 2 N. J. Eq. 51.

3, *Austin v. Bostwick*, 9 Conn. 496; 25 Am. Dec. 42; *Taylor v. Hillyer*, 3 Blackf. (Ind.) 433; 26 Am. Dec. 430; *Hinckley v. Gilligan*, 34 Me. 101; *Cady v. Shephard*, 11 Pick. 400; 22 Am. Dec. 379; *Bridge v. Ghay*, 14 Pick. 55;

25 Am. Dec. 358; Buxton v. Edwards, 134 Mass. 567; Rich v. Flanders, 39 N. H. 304, 338-9; Feigley v. Whitaker, 22 Ohio St. 606; 10 Am. Rep. 778; Fripp v. Williams, 14 S. C. 502; Woodworth v. Downer, 13 Vt. 522; 37 Am. Dec. 611; Bates Part. sec. 701 and cases there collected.

4, Baker v. Stackpole, 9 Cow. 421; Kerper v. Wood, 48 Ohio St. 613. See also cases last cited.

§ 252. Partnership to be proved before admissions are received.—It is very clear that before one partner can be charged with the admission of another, the partnership relation must be shown,—and that by other evidence than the admission itself. In such cases the admission can be received only to affect the person making it.¹ It is for the judge to determine whether there is *prima facie* evidence of the co-partnership.² But the "existence of the partnership may be proved by the separate admissions of all who are sued, or by the acts, declarations and conduct of the parties, or by the act of one and the declarations or conduct of others."³ And since it must often happen that the admissions of only one partner can be proved at a time, his declarations may be received when a partnership is alleged without proof of the partnership at that time, but it is the duty of the judge to instruct the jury that admissions can only bind the party making them, unless the partnership is also proved;⁴ and here as in other cases the order of the testimony is within the discretion of the judge.⁵

1, *Whitney v. Ferris*, 10 Johns. 66; *Robbins v. Willard*, 6 Pick. 464; *Winchester v. Whitney*, 138 Mass. 549; *Corriell v. Evans*, 1 G. Greene (Iowa) 25; *Hahn v. St. Clair Sav. Co.*, 50 Ill. 456; *Degan v. Singer*, 41 Ill. 28; *Gardner v. Northwestern Mfg. Co.*, 52 Ill. 367; *Cowan v. Kinney*, 33 Ohio St. 422; *Edgell v. Macqueen*, 8 Mo. App. 71.

2, *Hilton v. McDowell*, 87 N. C. 364.

3, *Pars. Part.* (3d ed.) p. 204 and cases there cited; *Smith v. Collins*, 115 Mass. 388; *Jennings v. Estes*, 16 Me. 323; *Mershon v. Hobensack*, 22 N. J. L. 372; *Reed v. Kremer*, 111 Pa. St. 482; *Barcroft v. Haworth* 29 Iowa 462. Such declarations are received where partners are sued also as conspirators, *Work v. McCoy*, 87 Iowa 217.

4, *Jennings v. Estes*, 16 Me. 323.

5, *Hilton v. McDowell*, 87 N. C. 364; *Lea v. Guice*, 21 Miss. 656.

§ 253. Admissions by joint contractors, not partners.—It has been sometimes held that in the case of mere joint contracts, where there is no partnership relation, neither joint contractor is to be presumed to be the agent of the other to charge him by admissions, and that in such cases the admissions of one are not admissible against the others.¹ But by the prevailing rule at common law the admission of one of several persons jointly interested in the subject matter relating to such subject were admissible against the others.² Thus, the admissions of one co-obligor upon a bond have been received against the other;³ and the admissions of one *joint maker* of a promissory *note* constituting a defense against the other maker have also been held

competent.⁴ The same is true of joint grantors,⁵ joint purchasers of personal property⁶ and joint covenantors.⁷ It is clear that the admissions of one person cannot be admitted in evidence against another on the ground of a joint interest in the subject, unless the *interest* is a *subsisting* one at the time of the admission.⁸ And when the joint contract is severed by the death of one of the contractors, the subsequent admissions of the survivor as to past events do not bind the representatives of the deceased.⁹

1, Lewis v. Woodworth, 2 N. Y. 512; 51 Am. Dec. 319; Wallis v. Randall, 81 N. Y. 164.

2, Whitcomb v. Whiting, 2 Doug. 652; Perham v. Raynal, 2 Bing. 306; Burleigh v. Stott, 8 Barn. & C. 36; Wyatt & Hodson, 8 Bing. 309; Frye v. Barker, 4 Pick. 382; Johnson v. Beardslee, 15 Johns. 3; Wallis v. Randall, 81 N. Y. 164; Coit v. Tracy, 8 Conn. 268, 276; 20 Am. Dec. 110; Camp v. Dill, 27 Ala. 553; Van Keuren v. Parmelee, 2 N. Y. 523; 51 Am. Dec. 322; Smith v. Collins, 115 Mass. 388 National Bank v. Cotton, 53 Wis. 31.

3, Crosse v. Bedingfield, 12 Sim. 35.

4, Martin v. Root, 17 Mass. 221; Camp v. Dill, 27 Ala. 553; Bound v. Lathrop, 4 Conn. 336; 10 Am. Dec. 147; Bar. rick v. Austin, 21 Barb. 241; Brown v. Munger, 16 Vt. 12; Iglehart v. Jernegan, 16 Ill. 513. Contra, Nye v. Grubbs, 16 Miss. 643.

5, Jackson v. Vail, 7 Wend. 125.

6, Ratan v. Nichols, 22 Ark. 244.

7, Walling v. Rosevelt, 16 N. J. L. 41.

8, Blakeney v. Ferguson, 14 Ark. 641.

9, Atkins v. Tredgold, 2 Barn. & C. 23; Fordham v. Wallis, 10 Hare 217; Slaymaker v. Gundacker, 10 Serg. & R. (Pa.) 75.

§254. Declarations by persons having a mere community of interest.—

The mere fact that several persons have a *common interest* in the subject matter involved in the suit does not render their admissions competent against each other. For example, the admissions of an *executor* or of an *administrator* are not admissible against the heirs or devisees,¹ or against his co-executor or co-administrator,² or against a subsequent administrator *de bonis non*.³ Admissions are received on the principle that they are statements against the interest of the party. The administrator or executor as such has no such legal interest in the estate that he ought to be allowed to prejudice its interests by statements to third persons. In a legal sense it is to him personally a matter of indifference whether claims are allowed or disallowed or whether the assets are distributed among creditors or among heirs and next of kin.⁴ And the rule is the same although the administrator is also one of the heirs of the estate, as in that capacity he has no such joint interest with the other heirs as to charge them by his admissions.⁵ Of course statements of an executor or administrator made while representing an estate and attending to its business may be admitted when they constitute a part of the *res gestae*.⁶ In a Massachusetts case where the issue was whether the will of the deceased was procured by fraud and un-

due influence, and whether the testator was ignorant of its contents, it was held that the admissions of the executor and legatees could not be received, although parties to the record, to the prejudice of other legatees or devisees; that there was no such relation of privity or joint interest as to render the statements admissible.⁷ The admissions of an *heir* are not admissible to prove a claim against the executor or administrator,⁸ unless he is the only heir interested upon that side of the action.⁹ The admissions of one *tenant in common* are not evidence against another.¹⁰ Thus it was held that the evidence which a part owner of a vessel had given in a former suit as to the extent and cost of the repairs put upon the vessel was not admissible against the other part owners.¹¹ Nor is there any such joint interest or privity among the members of a board of public officers,¹² nor among several *indorsers* of a promissory note,¹³ nor between a trustee and a *cestui que trust*,¹⁴ or trustees and their colleagues¹⁵ as to make the admission of one evidence against all.

1, Crandall v. Gallup, 12 Conn. 365; Marshall v. Adams, 11 Ill. 37; Dent v. Dent, 3 Gill (Md.) 482; Mangun v. Webster, 7 Gill (Md.) 78; Fellows v. Fellows, 37 N. H. 75; Ellwood v. Deifendorf, 5 Barb. 398; Osgood v. Pres. Manhattan Co., 3 Cow. 612; 15 Am. Dec. 304; Davis v. Gallagher, 124 N. Y. 487. But see Heywood v. Heywood, 10 Allen 105.

2, Hammon v. Huntley, 4 Cow. 493; Fox v. Waters, 12 Adol. & Ell. 43; Walkeep v. Pratt, 5 Harr. & J. (Md.) 51;

Potter v. Greene, 51 Hun 6; Bruyn v. Russell, 52 Hun 17.

3, Pease v. Phelps, 10 Conn. 62. Contra, Eckhert v. Triplett, 48 Ind. 174; 17 Am. Rep. 735.

4, Hueston v. Hueston 2 Ohio St. 489; Jones v. Jones, 21 N. H. 219; Church v. Howard, 79 N. Y. 415.

5, Hueston v. Hueston, 2 Ohio St. 489; Church v. Howard, 79 N. Y. 415.

6, Whiton v. Snyder, 88 N. Y. 299; Eckert v. Triplett, 48 Ind. 174; 17 Am. Rep. 735; Davis v. Calvert, 5 Gill & J. (Md.) 269; 25 Am. Dec. 282 and note.

7, Shailer v. Bumstead, 99 Mass. 112; Hauberger v. Root, 6 Watts & S. (Pa.) 431; Hayes v. Burkham, 67 Ind. 359. The same rule applies as to the admission of one of several legatees as to the insanity of the testator, McMullan v. McDill, 110 Ill. 47.

8, Blake's Heirs v. Quash's Ex., 3 McCord (S. C.) 340; Bovard v. Wallace, 4 Serg. & R. (Pa.) 499; Dietrich v. Dietrich, 4 Watts (Pa.) 167 and note; Boyd v. Eby, 8 Watts (Pa.) 66; Hauberger v. Root, 6 Watts & S. (Pa.) 431; Roberts v. Trawick, 13 Ala. 68, 81. The same rule holds as to the admissions of a devisee, O'Connor v. Madison, 98 Mich. 183.

9, Nussear v. Arnold, 13 Serg. & R. (Pa.) 323.

10, Dan v. Brown, 4 Cow. 483; 15 Am. Dec. 395; Lane v. Doty, 4 Barb. 536; Corning v. Troy Factory, 39 Barb. 325.

11, The "New Orleans," 106 U. S. 13.

12, Lockwood v. Smith, 5 Day (Conn.) 309.

13, Slaymaker v. Gundacker, 10 Serg. & R. (Pa.) 75.

14, Bragg v. Geddes, 93 Ill. 39; Eitelgeorge v. Mutual Assn., 69 Mo. 52. But see, Mason v. Poulson, 40 Md. 355.

15, Salado College v. Davis, 47 Tex. 131; Walker v. Dunspaugh, 20 N. Y. 170.

§ 255. Declarations by wrong-doers — Conspiracy. — There is in general no

such joint interest between wrong-doers in actions for negligence, trespass or other torts that the declaration of one defendant is an admission against the others.¹ But in such cases if the declaration or act forms a part of the *res gestae*, it is admissible on grounds elsewhere discussed, not only as an admission affecting the declarant, but as substantive evidence.² So where several persons having a common motive are associated for the same illegal purpose, an act or declaration of one of the parties in reference to the common object and forming part of the *res gestae* is admissible against the other;³ and where several *jointly* attempt to accomplish a *fraud*, the declarations of one of them made during the progress and in the prosecution of the joint undertaking or accompanying and explaining acts done in furtherance of it are evidence against the others.⁴ Thus in an action by a woman for indecent assault, the defendant may introduce evidence of statements by the plaintiff's husband tending to show that the action was brought to carry out a scheme contrived by them for extorting money. But the combination must be clearly proved to render such evidence admissible.⁵ It is on the same principle that, when a *conspiracy* is shown, the acts and declarations of each conspirator in furtherance of the common object are admissible against the others.⁶ But in such cases it must first be proved by

other evidence that a conspiracy existed at the time the declarations were made. The mere declarations of one of the alleged conspirators are not competent for this purpose, unless they form a part of the *res gestae*.⁷ Nor, even if a conspiracy is shown *aliunde*, are the declarations of one conspirator admissible against the others, if not made during the prosecution of the undertaking, but after the common design is accomplished or abandoned.⁸ The common fraudulent design may be shown by subsequent participation in the fraud and its fruits with the knowledge of the facts; and where there is proof of a common design to defraud, the declarations of one participant are admissible against the other, although made in his absence.⁹

1, *Morse v. Royal*, 12 Ves. 362. On the subject of this section see note, 1 L. R. A. 273.

2, *Carpenter v. Welden*, 5 Sandf. (N. Y.) 77; *Wilson v. O'Day*, 5 Daly (N. Y.) 354; *North v. Miles*, 1 Camp. 389; *Bowsher v. Calley*, 1 Camp. 391; *Rex v. Hardwick*, 11 East 585; *Powell v. Hodgetts*, 2 Car. & P. 432.

3, *American Fur Co. v. U. S.*, 2 Peters 358; *Lincoln v. Claflin*, 7 Wall. 132; *Nudd v. Burrows*, 91 U. S. 426; *Johnson v. State*, 29 Ala. 62; 65 Am. Dec. 383; *Clinton v. Estes*, 20 Ark. 216; *State v. Ross*, 29 Mo. 32; *State v. Nash*, 7 Iowa 347; *State v. Grady*, 34 Conn. 118; *Oldham v. Bentley*, 6 B. Mon. (Ky.) 428; *State v. Hogan*, 3 La. An. 714; *State v. Soper*, 16 Me. 293; 33 Am. Dec. 665; *Com. v. Brown*, 14 Gray 419; *People v. Pitcher*, 15 Mich. 397; *Mask v. State*, 32 Miss. 405; *Preston v. Bowers*, 13 Ohio St. 1; 82 Am. Dec. 430; *State v. Thibau*, 30 Vt. 100; *Crary v. Sprague*, 2 Wend. 41; 27 Am. Dec. 110, 115 and note.

4, *Lee v. Lamprey*, 43 N. H. 13; *Patton v. Freeman*, 1 N. J. L. 113; *Apthrop v. Comstock*, 2 Paige 482; *Jackson v. Summerville*, 13 Pa. St. 359; *Peterson v. Speer*, 29 Pa. St. 479; *Scott v. Baker*, 37 Pa. St. 330; *Jenne v. Joslyn*, 41 Vt. 478.

5, *Mawich v. Elsey*, 47 Mich. 10.

6, *Metcalf v. Conner*, Litt. Sel. Cas. (Ky.) 497; 12 Am. Dec. 340; *Com. v. Crowninshield*, 10 Pick. 497; *Lynes v. State*, 36 Miss. 617; *State v. Ross*, 29 Mo. 32; *Clinton v. Estes*, 20 Ark. 216; *Benford v. Sanner*, 40 Pa. St. 9; 80 Am. Dec. 545.

7, *Metcalf v. Conner*, Litt. Sel. Cas. (Ky.) 497; 12 Am. Dec. 340; *Burke v. Miller*, 7 Cush. 547; *Benford v. Sanner*, 40 Pa. St. 9; 80 Am. Dec. 545.

8, *Lynes v. State*, 36 Miss. 617; *State v. Ross*, 29 Mo. 32; *Clinton v. Estes*, 20 Ark. 216; *Benford v. Sanner*, 40 Pa. St. 9; 80 Am. Dec. 545; *State v. Duncan*, 64 Mo. 262.

9, *Lincoln v. Claffin*, 7 Wall. 132; *Nudd v. Burrows*, 91 U. S. 426.

‡ 256. **Declarations of agents.**—As a general rule parties are not chargeable with the admissions of their agents, unless such admissions or statements are made during the transaction of business by the agent for the principal and in relation to such business and while within the scope of the agency, in other words, unless the representations may be deemed a part of the *res gestae*.¹ This principle has been illustrated under another head by numerous cases from which it appears that one condition of receiving the declarations of one alleged to be an agent is that the *agency* must be *proved aliunde* and not by

the declarations themselves,² although such proof need not be invariably introduced in the first instance, the order of proof being within the discretion of the court.³ The *declarations* of the alleged agent are *not competent* to prove such agency, although they are accompanied by acts purporting to be acts of agency. Although, of course, such declarations and acts are competent if there is proof of former similar acts or declarations recognized or approved by the principal.⁴ Since the declarations of the agent are not admissible unless they constitute a part of the *res gestae*, they cannot be received, unless they are *contemporaneous* with the acts which they illustrate and of which they form a part.⁵ The declarations of an agent while acting within the scope of his business and authority are *original evidence*. They are the ultimate fact to be proved and not an admission of some other fact; and the only question is whether the declarations were made and relied upon.⁶ It often happens, however, that the declarations of an agent are admissible as part of the *res gestae* and that they form no part of any contract and contain no element of estoppel, in which cases they are, of course, open to explanation or may be shown to be incorrect, like admissions in general. Of this character are numerous cases referred to in another section where the declarations of agents and employes contemporaneous with

alleged acts of negligence were held admissible as against the principal.¹

1, *Governor v. Baker*, 14 Ala. 652; *Byers v. Fowler*, 14 Ark. 86; *Griffin v. Montgomery Ry. Co.*, 26 Ga. 111; *Hynds v. Hays*, 25 Ind. 31; *Dorne v. Southwork Mfg. Co.*, 11 Cush. 205; *Converse v. Blumrich*, 14 Mich. 109; 90 Am. Dec. 230; *Lowery v. Harris*, 12 Minn. 255; *Moore v. Bettis*, 11 Humph. (Tenn.) 67; 53 Am. Dec. 771; *Hayward Rubber Co. v. Dunklee*, 30 Vt. 29; *Cliquot's Champagne*, 3 Wall. 114, 140; *Burnham v. Ellis*, 39 Me. 319; 63 Am. Dec. 625; *Runk v. Ten Eyck*, 24 N. J. L. 756; *American Fur Co. v. United States*, 2 Peters 358; *Sandford v. Handy*, 23 Wend. 260; *People v. Vernon*, 35 Cal. 49; 95 Am. Dec. 48 and note 72; *Lee v. Munroe*, 7 Cranch 366; *Thollhimer v. Brinckeroff*, 4 Wend. 394; 21 Am. Dec. 155; *Stewartson v. Watts*, 8 Watts (Pa.) 392; *Fairlie v. Hastings*, 10 Ves. 123; *Gott v. Dinsmore*, 111 Mass. 45; *Nichols v. Southern Pac. Ry. Co.*, 23 Ore. 123; *Robinson v. Walton*, 58 Mo. 380; *McComb v. N. C. Ry. Co.*, 70 N. C. 178; *Linblom v. Ramsey*, 75 Ill. 246; *Sweatland v. Illinois Telegraph Co.*, 27 Iowa 433; *Kilpatrick v. Kahn*, 53 Kan. 274. But there is an exception when the transaction is said to be tainted with fraud growing out of the confidential relations of the agent and other parties, *Jones v. Jones*, 120 N. Y. 589. On the general subject of this section see valuable notes, 53 Am. Dec. 773-778; 95 Am. Dec. 72-75.

2, *Moffitt v. Cresler*, 8 Iowa 122; *Fitch v. Chapman*, 10 Conn. 8; *Mapp v. Phillips*, 32 Ga. 72; *Wabash Canal v. Bledsoe*, 5 Ind. 133. See sec. 252 *supra*. *Farmer v. Lewis*, 1 Bush (Ky.) 66; 89 Am. Dec. 610; *Hatch v. Squires*, 11 Mich. 185; *Sencerbox v. McGrade*, 6 Minn. 484; *Royal v. Sprinkle*, 1 Jones L. (N. C.) 505; *Robeson v. Schuylkill Nav. Co.*, 3 Grant Cas. (Pa.) 186; *Latham v. Pledger*, 11 Tex. 439; *Johnson v. East Tennessee Ry. Co.*, 90 Ga. 810.

3, *Woodbury v. Larned*, 5 Minn. 339; *First Unitarian Soc. v. Faulkner*, 91 U. S. 415, 420.

4, *Ætna Ins. Co. v. Northwestern Iron Co.*, 21 Wis. 458; *Donaldson v. Everhart*, 50 Kan. 718; *Nation v. Thomas*, 25

Tex. 221; *Manilla v. Houghton*, 154 Mass. 465; *Winchester Manufacturing Co. v. Creary*, 116 U. S. 161 and cases above cited.

5, For numerous illustrations of this principle see secs. 359, 360 *infra*.

6, 1 Phil. Ev. 381.

7, See sec. 359 *et seq. infra*.

§ 257. Same—Effect of such declarations.—The power of an agent to bind his principal by admissions may be shown by proof of express authority or it may be inferred from the nature of the employment. If a general agent acts within the apparent scope of his authority, he may bind his principal, although the acts and declarations are in violation of his express orders, unless such orders are known to the other party.¹ Thus, if the agent of a horse dealer having power to sell gives a warranty, the principal is bound, although he had given express directions not to warrant.² Where a broker makes a sale in the usual course of business his admissions and representations made at the time bind the principal, although contrary to direct instructions.³ But the principle just stated does not apply to the declarations of *public agents*. While individuals are liable to the extent of the power they have apparently given to their agents, the government or municipalities are liable only to the extent of the power *actually conferred*; and all persons must take notice

of the extent of the authority of those acting in an official capacity.⁴

1, Barber v. Britton, 26 Vt. 112; Meindorff v. Wickersham, 63 Pa. St. 87; Lobdell v. Baker, 1 Met. 193, 203; 35 Am. Dec. 358; Wright v. Reusens, 133 N. Y. 298. See extended note, 53 Am. Dec. 773-778. See also the following sections.

2, Pickering v. Busk, 15 East 43.

3, Lobdell v. Baker, 1 Met. 193; 35 Am. Dec. 358; Daylight Burner Co. v. Odlin, 51 N. H. 56; 12 Am. Rep. 45; Dias v. Chickering, 64 Md. 348; 54 Am. Rep. 770; Higgins v. McCrea, 116 U. S. 671.

4, The Floyd Acceptance, 7 Wall. 666; Clark v. Des Moines, 19 Iowa 199; 87 Am. Dec. 423 and note; Pierce v. United States, 1 Ct. of Cl. 270; Grant v. United States, 5 Ct. of Cl. 71; State v. Hayes, 52 Mo. 578; Mayor v. Reynolds, 26 Md. 1; Delafield v. State, 26 Wend. 238; Beach Pub. Corp. sec. 242; Dill. Mun. Corp. sec. 447 and cases cited. See note, 53 Am. Dec. 777-778.

258. Admissions by attorneys.—In the conduct of litigation it is frequently to the advantage of the parties for their attorneys to make stipulations as to questions of fact or dispensing with proof of certain facts. Attorneys are deemed the agents of their clients for the purpose of making such admissions in all matters relating to the progress and trial of the action.¹ Thus, attorneys may bind their clients by admitting the execution of instruments,² and the amount due on a debt.³ They may dismiss or discontinue an action,⁴ consent to a nonsuit,⁵ stipulate as to the issues to be tried,⁶ waive informalities,⁷ consent to a reference or admit all the facts

in issue for the purpose of determining the questions of law involved.⁸ Indeed, any fact bearing upon the issues involved admitted by counsel may be the ground of the court's procedure equally as if established by the clearest proof.⁹ When admissions of this character are formally made for the purpose of waiving certain proofs or rules of practice, they are *conclusive* upon the client and cannot be withdrawn. It would operate as a fraud upon the adverse party, if, after he had been thus induced to withhold necessary proofs, he should be compelled to prove the facts which had been admitted, or to submit to defeat.¹⁰

1, See cases cited below.

2, *Young v. Wright*, 1 Camp. 141; *Griffith v. Williams*, 1 T. R. 710; *Goldie v. Shuttleworth*, 1 Camp. 70.

3, *Wilson v. Spring*, 64 Ill. 14.

4, *McLeron v. McNamara*, 55 Cal. 508; *Rogers v. Greenwood*, 14 Minn. 333; *Gaillard v. Smart*, 6 Cow. 385; *Barrett v. Third Ave. Ry. Co.*, 45 N. Y. 628; *Davis v. Hall*, 90 Mo. 659.

5, *Lynch v. Cowell*, 12 Law T. 548.

6, *Bingham v. Supervisors*, 6 Minn. 136.

7, *Hanson v. Hoijt*, 14 N. H. 56.

8, *Stokeley v. Robinson*, 34 Pa. St. 315; *Wade v. Powell*, 31 Ga. 1; *Smith v. Bossard*, 2 McCord Eq. (S. C.) 406; *Tiffany v. Lord*, 40 How. Pr. (N. Y.) 481.

9, *Starke v. Kenan*, 11 Ala. 818; *Farmers Bank v. Sprigg*, 11 Md. 389; *Pike v. Emerson*, 5 N. H. 393; *Talbot v. McGee*, 4 T. B. Mon. (Ky.) 377; *Lewis v. Sumner*, 13 Met. 269.

10, *Oscanyan v. Arms Co.*, 103 U. S. 261; *Alton v. Gilmanton*, 2 N. H. 520; *Davies v. Burton*, 4 Car. & P. 166.

§ 259. **Same—Effect of such admissions.**—During the progress of the trial attorneys stand in the place of their clients and may perform the same acts which such clients might perform in person, hence there is scarcely any limit to the admissions which they may make. Such admissions are not confined to stipulations regarding the facts of the case or to the waiver of proofs. The attorney may, by his express statements during the trial or by his mode of conducting the action, *wave* a part of *the relief* which he might otherwise claim.¹ And by the constant practice of the courts parties are precluded from questioning the regularity of proceedings or the competency of evidence to which they have failed to make timely objection.² But, although the English rule is otherwise, by the clear weight of authority in the United States attorneys have *no implied power to compromise* and settle their clients' claims.³ It is essential to the orderly conduct of business in the courts that attorneys who stand in the place of their clients should frequently make formal admissions of the character already mentioned; and, if made in the presence of the court, it is immaterial whether they be *oral or written* or whether

they be *express* or plainly *inferred* from the *conduct* on which the opposite attorney and the court have the right to rely;⁴ and in such cases the admissions and acts of the attorney are to be treated as those of the client; and are conclusive upon him, unless fraud or collusion is shown.⁵ Stipulations in writing made by attorneys out of court dispensing with proof of certain facts are also conclusive upon their clients.⁶ It is a good illustration of the effect given to the admissions of counsel that the courts sometimes grant a *nonsuit* or in the federal courts direct a verdict *upon the opening statement* of the plaintiff's counsel, when such statements are unambiguous in their meaning, and in the opinion of the court clearly show that there should be no recovery.⁷ Where attorneys make statements as to facts in controversy in the presence of their clients who make no objection, such statements are competent as admissions.⁸

1; Hoyt v. Gelston, 13 Johns. 141.

2, White v. Kibling, 11 Johns. 128.

3, Fritchey v. Bosley, 56 Md. 94; North Whitehall v. Keller, 100 Pa. St. 105; 45 Am. Rep. 361; Jones v. Inness, 32 Kan. 177; Kelly v. Wright, 65 Wis. 236; Roberts v. Nelson, 22 Mo. App. 28; Whipple v. Whitman, 13 R. I. 512; 43 Am. Rep. 42; Granger v. Batchelder, 54 Vt. 248; 41 Am. Rep. 846; Ambrose v. McDonald, 53 Cal. 28; Pickett v. Bank, 32 Ark. 346; Mandeville v. Reynolds, 68 N. Y. 528; Wetherbee v. Fitch, 117 Ill. 67; Roller v. Wooldridge, 46 Tex. 485; Moye v. Cogdell, 69 N. C. 93. Contra, Bonney v. Morrill, 57 Me. 368.

4. *Doe ex dem. Child v. Roe*, 1 El & B. 279; *Stracy v. Blake*, 1 M. & W. 168; *Wilson v. Spring*, 64 Ill. 14; *Loomis v. New York N. H & H. R. Ry. Co.*, 159 Mass. 39.

5. *Colledge v. Horn*, 3 Bing. 119; *Wilkins v. Stidger*, 22 Cal. 231; 83 Am. Dec. 64; *Wilson v. Spring*, 64 Ill. 14.

6. *Fowler v. Gilman*, 13 Met. 267. As to oral agreement out of court not controverted, see *People v. Stephens*, 52 N. Y. 306.

7. *Oscanyan v. Arms Co.*, 103 U. S. 261; *Clews v. Bank*, 105 N. Y. 398.

8. *Lord v. Bigelow*, 124 Mass. 185; *Colledge v. Horn*, 3 Bing. 119.

260. Casual statements — Informal admissions. — Statements made by attorneys out of court and not during the transaction of business within their employment are not admissible against their clients, even though such statements relate to the subject matter in controversy. It would be an intolerable rule, if by mere loose conversations attorneys were allowed to divest their clients of the rights they are bound to protect.¹ The statements of an attorney during a conversation held for the purpose of settling a controversy are not admissible;² nor are the statements of an attorney, with whom a demand is left for collection, admissible as to collateral facts;³ nor do such admissions made in an unauthorized letter to one against whom a suit is contemplated bind the client.⁴ But in the conduct of the business preparatory to trial, there may be incidental admissions made by counsel waiving the proof of certain

facts, although no such intention exists; for example, an attorney gave a notice describing a paper as "a bill which was accepted by said defendant," which was held *prima facie* evidence of acceptance by the defendant.⁵ But an affidavit for continuance made by the attorney, as to which the party has no knowledge, is not competent as an admission.⁶

1, Petch v. Lyon, 9 Q. B. 147; Young v. Wright, 1 Camp 139; Parkins v. Hawkshaw, 2 Stark. 239; Doe v. Richards 2 Car. & K. 216; Saunders v. McCarthy, 8 Allen 43; Rockwell v Taylor, 41 Conn. 55; McKeen v. Gammon, 33 Me. 187; Douglas v. Mitchell, 35 Pa. St. 440; Treadway v. S. C. Ry. Co., 40 Iowa 526; Thomas v. Kinsey, 8 Ga. 421; Angle v. Bilby, 25 Neb. 595; Worley v. Hineman, 6 Ind. App. 240; Proctor v. Old Colony Ry. Co., 154 Mass. 251.

2, Saunders v. McCarthy, 8 Allen 43.

3, Underwood v. Hart, 23 Vt. 120.

4, Solomon Ry. Co. v. Jones, 34 Kan. 443.

5, Holt v. Squire, Ryan & M. 282; Marshall v. Cliff, 4 Camp. 133; Milward v. Temple, 1 Camp. 375.

6, Murray v. Chase, 134 Mass. 92.

§ 261. Same — Different actions or trials.—The admissions made by an attorney in one action are not admissible in a different action between the same parties.¹ But where an absolute and unqualified admission is made in a pending cause, whether by written stipulation of the attorney or as matter of proof on the hearing, it may be used on a subsequent trial and can not be retracted, unless by leave of the court on a proper showing of mistake,

imposition or surprise.² But mere informal admissions made by counsel on one trial are not admissible on a second trial;³ and admissions by an attorney on the trial of a cause as to the amount of the damages in case of recovery do not bind his client at a subsequent trial.⁴ Some of the cases already cited illustrate the rule that admissions of this character are not confined to the statements or stipulations made by the attorney during the trial of the cause. The admissions may be *before the trial* and may be derived from bills of particulars,⁵ or notices, or other documents served during the progress of the cause.⁶ It is hardly necessary to add that the statements of an attorney are not admissible if made *before* his *employment* commenced, or after it has ceased.⁷ Nor is it to be inferred that an attorney has authority to compromise a claim left in his hands for collection by receiving a sum less than its face value.⁸ Whenever the statements of an attorney would be competent as admissions, the statements of his *clerk* acting in his place are also competent.⁹

1, Wilkins v. Stidges, 22 Cal. 231; 83 Am. Dec. 64; Moffitt v. Witherspoon, 10 Ired. (N. C.) 185; Harrison's Devisees v. Baker, 4 Litt. (Ky.) 250. See extended note, 99 Am. Dec. 480-481.

2, Truelove v. Burton, 9 Moore 64; Owen v. Cawley, 36 N. Y. 600; Perry v. Simpson Mfg. Co., 40 Conn. 313; Holley v. Young, 68 Me. 215; 28 Am. Rep. 40; Union Pac. Ry.

Co. v. Shoup, 28 Kan. 394. For further discussion as to when admissions may be withdrawn see sec. 276 *infra*.

3, **Colledge v. Horn**, 3 Bing. 119; **Rex v. Coyle**, 7 Cox. Cr. C. 74; **Wilkins v. Stidger**, 22 Cal. 231; 83 Am. Dec. 64.

4, **Weisbrod v. Chicago & N. W. Ry. Co.**, 20 Wis. 419.

5, **Rymer v. Cook**, 1 Moody & M. 86 and note.

6, **Holt v. Squire**, Ryan & M. 282.

7, **Janeway v. Skerritt**, 30 N. J. L. 97.

8, **Insurance Co. v. Buchanan**, 100 Ind. 63; **Repp v. Wiles**, 3 Ind. App. 167.

9, **Griffiths v. Williams**, 1 T. R. 710; **Truelove v. Burton**, 9 Moore 64; **Taylor v. Williams**, 2 Barn. & Adol. 845; **Standage v. Creighton**, 5 Car. & P. 406; **Power v. Kent**, 1 Cow. 211; **Birkbeck v. Stafford**, 14 Abb. (N. Y.) 285; 23 How. Pr. (N. Y.) 236.

§ 262. Admissions of husband and wife.—The declarations of the husband may be received against the wife, or those of the wife may be received against the husband as admissions when, under the general principles of agency, the declarant is the agent of the other party, and the declarations are made by express authority within the scope of such agency, and as a part of the *res gestae*.¹ Of course this rule must be applied with the limitation that the powers of married women to enter into contracts are greatly restricted, and hence she can only appoint agents to act within those limits.² But it is well settled that either the husband or the wife may act as the agent of the other, and, within the scope of such agency, may bind the other by admissions or acknowledgments;³ and the wife may

charge the husband by her acts and statements in obtaining those *necessaries* which the husband has neglected or refused to furnish. In such case the agency arises from the marriage relation by operation of law.⁴ But in other cases the *authority* to make admissions *must be shown* before the declarations of either husband or wife can be received against each other;⁵ and although such authority may as in other cases of agency be implied from the acts and conduct of the parties or from subsequent ratification, it *cannot be implied from the mere existence of the marriage relation.*⁶ Thus in the absence of proof of agency, the declarations of a wife in the lifetime of her husband showing his liability to a debt are inadmissible;⁷ and a husband's admissions are incompetent to prove that he is agent for his wife in matters concerning her separate property.⁸ It has been frequently held that, where the husband and wife are joined as parties plaintiff, the admissions of the wife are not competent against the husband although they sue in her right, as for her wages or debts due her.⁹ On the same principle it was held that admissions made by a wife without her husband's knowledge, were not competent evidence of a way by prescription over land owned by them in her right.¹⁰ It is to be observed, however, that inasmuch as modern *statutes have greatly extended the powers of married women* in re.

spect to the holding of property and the making of contracts, their power to affect such property by admissions has been correspondingly increased; and that, in so far as married women may make contracts and carry on business, their admissions are evidence against themselves.¹¹ In an action by or against the trustee of a married woman, her admissions like those of any other *cestui que trust* are admissible,¹² even though her husband is the adverse party.¹³

1, *Emerson v. Blonden*, 1 Esp. 142; *Anderson v. Sander-son*, 2 Stark. 204; *Carey v. Adkins*, 4 Camp. 92; *Rose v. Chapman*, 44 Mich. 312; *Goodrich v. Tracy*, 43 Vt. 314; 5 Am. Rep. 281; *Livesley v. Lasalette*, 28 Wis. 38; *Starns v. Hadnot*, 42 La. An. 366.

2, *Stew. Hus. and Wife*, secs. 84-85.

3, *Stew. Hus. and Wife*, secs. 84-98.

4, *Stew. Hus. and Wife*, secs. 95-98; *Benjamin v. Benjamin*, 15 Conn. 347; 39 Am. Dec. 384 and note.

5, *Price v. Leydel*, 46 Iowa 696; *Edwards v. Tyler*, 141 Ill. 454; *Rowell v. Klein*, 44 Ind. 290; *Norfolk Bank v. Wood*, 33 Neb. 113; *Eystra v. Capelle*, 61 Mo. 578; *Evans, v. Evans*, 155 Pa. St. 572; *Livesley v. Lasalette*, 28 Wis. 38; *White v. Town of Portland*, 63 Conn. 18; *Donaldson v. Everhart*, 50 Kan. 718.

6, *Butler v. Price*, 115 Mass. 578; *Deck v. Johnson*, 1 Abb. Dec. (N. Y.) 497; *Martin v. Rutt*, 127 Pa. St. 380. See cases last cited also.

7, *May v. Little*, 3 Ired. (N. C.) 27; 38 Am. Dec. 707.

8, *Whitescarver v. Bonney*, 9 Iowa 480.

9, *Denn v. White*, 7 T. R. 112; *White v. Holman*, 12 Me. 157; *Turner v. Coe*, 5 Conn. 94; *Jordan v. Hubbard*, 26 Ala. 433; *Laselle v. Brown*, 8 Blackf. (Ind.) 221.

10, *McGregor v. Wait*, 10 Gray 72; 69 Am. Dec. 305.

11, *Morrell v. Cawley*, 17 Abb. Pr. (N. Y.) 76; *McLean v. Jagger*, 13 How. Pr. (N. Y.) 494; *Hackman v. Flory*, 16 Pa. St. 196; *Winter v. Walter*, 37 Pa. St. 155; *Laselle v. Brown*, 8 Blackf. (Ind.) 221.

12, *Tayl. Ev. sec. 766*.

13, *Schaley v. Goodman*, 1 Bing. 349.

§ 263. Same — Power to make admissions — How inferred.— Although the general power to make contracts and admissions cannot be inferred from the mere existence of the marital relation, yet the law will more readily presume an agency and sometimes imply a larger authority than if no such relation existed. But these inferences are founded on the fact that the acts are such as are usual and customary for the husband or wife to perform under similar circumstances.¹ Thus, it has been held competent to infer the authority of a wife to accept a notice in respect to a particular transaction from the fact that she was seen twice in her husband's office appearing to conduct his business relating to that transaction and once giving orders to the foreman;² or from the fact that he was absent from his place of business, and no one else was present to attend to it.³ But in all such cases the admissions of the husband or wife must fall *within the scope of the authority* which may be reasonably presumed from the nature of the business and the powers delegated.⁴ Thus, while a wife carrying on

a business for her husband might make admissions with respect to matters connected with the trade, she would have no implied authority to make admissions of an antecedent contract for the hire of the shop.⁵

1, Benjamin v. Benjamin, 15 Conn. 347; 39 Am. Dec. 384; Anonymous, 1 Strange 527; Church v. Landers, 10 Wend. 79.

2, Plimmer v. Sells, 3 Nev. & Man. 422.

3, Rotch v. Miles, 2 Conn. 638.

4, Meredith v. Footner, 11 M. & W. 202; White v. Holman, 12 Me. 157; Goodrich v. Tracy, 43 Vt. 314; 5 Am. Rep. 281; McGregor v. Wait, 10 Gray 72; 69 Am. Dec. 305; Coe v. Turner, 5 Conn. 86; Sheppard v. Stark, 3 Munf. (Va.) 29; Hunt v. Strew, 33 Mich. 85; May v. Little, 3 Ired. (N. C.) 27; 38 Am. Dec. 707; Hussey v. Elrod, 2 Ala. 339; 36 Am. Dec. 420; Jordan v. Hubbard, 26 Ala. 433; Queener v. Morrow, 1 Cold. (Tenn.) 123; Burnett v. Burkhead, 21 Ark. 77; 76 Am. Dec. 358; Butts v. Newton, 29 Wis. 632.

5, Meredith v. Footner, 11 M. & W. 202.

264. Same—In actions for divorce.

Unlike other contracts the contract of marriage cannot be dissolved by the mere consent and agreement of the parties; and in actions for the dissolution of this contract, that is for divorce, admissions are closely scrutinized. Although the husband and the wife are the parties to the record, the *state* is for some purposes *deemed interested* in the proceeding. The suit for divorce has been called a triangular proceeding *sui generis*, in which the government occupies the position of a third party.¹ Since the public have an interest in actions for di-

orce and ought not not to be bound by the admissions of one of the parties, it has generally been held that a divorce should not be granted upon the uncorroborated admission or confession of a party;² and in some states this rule is declared by statute.³ But when admissions or confessions are full, deliberate, free from collusion and corroborated, they can be treated as evidence of a high grade.⁴ On the other hand if they are obtained by fraud, collusion or duress, they should be rejected as of no value whatever; and owing to the temptation to collusion, admissions in divorce suits should always be carefully *scrutinized* when there is any reason to suspect that the parties desire a divorce.⁵ It is sometimes held that divorces may be granted on admissions or confessions alone, when it is clearly established by the circumstances of the case that there is no collusion.⁶ In those jurisdictions where the admissions must be corroborated by proof of other facts, the amount of corroboration required depends upon the opportunities for collusion; where there is less danger of collusion, the corroborating facts need not be so decisive as in other cases.⁷

1, 2 Bish. Mar. & Div. sec. 231; Stew. Mar. & Div. sec. 347. On the subject of this section see extended note, 30 Am. Dec. 544.

2, Woolfolk v. Woolfolk, 53 Ga. 661; Stibbins v. Stibbins, 1 Met. (Ky.) 476; Billings v. Billings, 11 Pick. 461; Armstrong v. Armstrong, 32 Miss. 279; White v. White, 45 N. H. 121; Miller v. Miller, 2 N. J. Eq. 139; 32 Am. Dec.

417; *Latham v. Latham*, 30 Gratt. (Va.) 307; *Richardson v. Richardson*, 50 Vt. 119; *Scott v. Scott*, 17 Ind. 309; *Succession of Weigel*, 18 La. An. 40; *True v. True*, 6 Minn. 458; *Devanbagh v. Devanbagh*, 5 Paige (N. Y.) 554; 28 Am. Dec. 443; *Robinson v. Robinson*, 16 Mich. 79; *Evans v. Evans*, 41 Cal. 103; *Summerbell v. Summerbell*, 37 N. J. Eq. 603.

3, 4 Md. Rev. Code (1878) p. 481; Cal. Code, 1881, sec. 130; *Matthai v. Matthai*, 49 Cal. 90.

4, *Matchin v. Matchin*, 6 Pa. St. 332; 47 Am. Dec. 466; *Mortimer v. Mortimer*, 2 Hagg. Const. 310; *Stone v. Stone*, 3 Notes of Cas. 278; *Tucker v. Tucker*, 5 Notes of Cas. 458; *Harris v. Harris*, 2 Hagg. Ecc. 160; 4 Eng. Ecc. 160; *Williams v. Williams*, 1 Hagg. Con. 299; 4 Eng. Ecc. 415; *Robinson v. Robinson*, 1 Swab. & T. 362; *Baker v. Baker*, 13 Cal. 87; *Evans v. Evans*, 41 Cal. 103.

5, *Derby v. Derby*, 21 N. J. Eq. 36; *Callender v. Callender*, 53 How. Pr. (N. Y.) 364.

6, *Williams v. Williams*, L. R. 1 Pro. & D. 29; *Robinson v. Robinson*, 1 Swab. & T. 362; *Tippet v. Tippet*, L. R. 1 Pro. & D. 54; *Johns v. Johns*, 29 Ga. 718; *Robbins v. Robbins*, 100 Mass. 150; *Matchin v. Matchin*, 6 Pa. St. 332; 47 Am. Dec. 466; *Billings v. Billings*, 11 Pick. 461.

7, *Sawyer v. Sawyer*, Walk. (Mich.) 48; *Baker v. Baker*, 13 Cal. 95.

§ 265. Admissions by persons referred to.—When a party to any proceeding expressly refers to any other person for an answer on a particular subject in dispute, such answer is in general evidence against him for the reason that he makes such third person his accredited agent for the purpose of giving such answer.¹ Thus in an action where the delivery of goods is in issue, if the defendant agrees to pay for the goods if a third

person will say that they had been delivered, the statement of such person may be admitted against the defendant;² and where a party referred to his wife as able to state the facts, her declarations were held admissible against him.³ So in an action against an express company for the loss of a trunk, the admissions of the defendant's general agents or of a freight clerk to whom those agents have referred the plaintiff for information as to the manner of the loss, when made in answer to his inquiries, are admissible against the company.⁴ If a vendor refers a purchaser to a third person for information in regard to the property to be sold, the declarations of such third person on the subject are admissible,⁵ but such a reference does not make the person referred to an agent for the purpose of making *general admissions*. The declarations are not evidence unless strictly within the subject matter in relation to which the reference is made.⁶ Thus where a defendant stated that a book-keeper would furnish whatever information was contained in the books, the declarations of the book-keeper to the effect that in his opinion certain entries in the book were false to the knowledge of the defendant were held inadmissible;⁷ and where a person refers to persons in the community as to the question of his general character, this does not make their declarations evidence against him.⁸

1, Duval v. Covenhoven, 4 Wend. 564; Allen v. Killinger, 8 Wall. 480; Price v. Lederer, 33 Mo. App. 426; Shaw v. Stone, 1 Cush. 228; Over v. Schiffing, 102 Ind. 191; 1 Greenl. Ev. sec. 182; Steph. Ev. art. 19.

2, Daniell v. Pitt, 1 Camp. 366.

3, Reg. v. Mallory, 33 Q. B. Div. 33.

4, Gott v. Dinsmore, 111 Mass. 45.

5, Chadsey v. Green, 24 Conn. 562; Chapman v. Twitchell, 37 Me. 59; 58 Am. Dec. 773; Bedell v. Commercial Ins. Co., 3 Bosw. (N. Y.) 147.

6, Duval v. Covenhoven, 4 Wend. 564; Allen v. Killinger, 8 Wall. 480.

7, Lambert v. People, 76 N. Y. 220; 32 Am. Rep. 293.

8, Rosenbury v. Angell, 6 Mich. 508.

§ 266. **Effect of consenting to pay on condition an affidavit is made.**—It has sometimes been held that where one party offers to pay a claim, provided the adverse party should make an affidavit of its validity, or in some other way agree to abide the results of such affidavit, he is concluded thereby although the affidavit proves untrue;¹ but by the weight of authority a party is not estopped under such circumstances. The purposes of justice and policy are sufficiently answered by throwing on him the *burden of proof*, and holding him bound, unless he impeaches the test referred to by clear proof of *fraud or mistake*.² It need hardly be added that if there is a clear and explicit agreement to submit to *arbitration*, which agreement is acted upon, the parties are mutually

estopped to question the conclusiveness of the decision, unless it is impeachable under the law governing awards.³

1, Brooks v. Ball, 18 Johns. 337; Bretton v. Prettiman, L. Raym. 153; Amie v. Andrews, 1 Mod. 166; Stevens v. Thacker, Peake 107; Lloyd v. Willan, 1 Esp. 178.

2, Tayl. Ev. sec. 765; 1 Greenl. Ev. sec. 184; Whitehead v. Tattersall, 1 Adol. & Ell. 491.

3, Sybray v. White, 1 M. & W. 435; Price v. Hollis, 1 Maule & S. 105; Males v. Lowenstein, 10 Ohio St. 512; Burrows v. Guthrie, 61 Ill. 70; Trustees v. Cokely, 5 Ind. 164; Reynolds v. Roebuck, 37 Ala. 408.

§ 267. Admissions by interpreters.—When a person selects an interpreter to communicate with another person, and to receive the answers, such interpreter is the accredited agent of the one employing him; and the statements of the interpreter in the course of the employment are admissible as original evidence, and are in no sense hearsay; nor is it necessary to call the interpreter to prove such statements, or that his interpretation was correct.¹ Although the circumstances may be such as to make the interpreter an agent whose words are binding on the parties, he is *not necessarily an agent*; and the mere fact that a person contracts with another whose language he does not understand, by means of an interpreter, does not constitute the latter an agent so as to bind him by a false translation of the language of the parties.² One who acts as in-

terpreter during a trial is not the agent of the parties, but the *officer of the court*.³ His statements given on a former trial cannot be admitted as evidence, unless his absence is satisfactorily explained.⁴

1, *Camerlin v. Palmer Co.*, 10 Allen 539; *Fabrigas v. Mostyn*, 20 How. St. Tr. 122; *McCormick v. Fuller*, 56 Iowa 43. A wife's statement while acting as interpreter for her husband may be proved, *Schutter v. Williams*, (Ohio) 1 West. L. J. 319. See note, 17 L. R. A. 813.

2, *Diener v. Diener*, 5 Wis. 483.

3, *Schearer v. Harber*, 36 Ind. 536.

4, *People v. Ah Yute*, 56 Cal. 119; *People v. Lee Fat*, 54 Cal. 527; *Shearer v. Harber*, 36 Ind. 536.

§ 268. **Declarations of persons acting in a representative capacity.**—When a party to a civil action has made admissions of facts material to the issue, they are as a rule admissible against him. So far as affects their competency it is immaterial whether they are oral or written, or to whom they were addressed, or when they were made.¹ An important qualification of the last statement is, however, to be noted, which is that, if the admission is made by a person suing or being sued in a *representative capacity* only, it must be made while the person making it sustains that capacity.² Thus, although it has sometimes been intimated that the statements of an executor or assignee or other representative made *before his appointment* might be admissible,³ yet it is the rule sustained by the

weight of authority that such admissions of an executor or administrator,⁴ guardian⁵ or trustee⁶ cannot be received, except to affect themselves individually,⁷ although statements of such persons might be competent, if made while representing the person beneficially interested, and in the transaction of business or in performance of the trust in such manner as to be part of the *res gestae*.⁸

1, Cook v. Barr, 44 N. Y. 156.

2, Steph. Ev. art. 16.

3, Smith v. Morgan, 2 Moody & Rob. 257.

4, Church v. Howard, 79 N. Y. 415; Brooks v. Goss, 61 Me. 307; Dent v. Dent, 3 Gill (Md.) 482; Prudential Ins. Co. v. Fredericks, 31 Ill. App. 419.

5, Lamar v. Micou, 112 U. S. 452; Westenfelder v. Green, 24 Ore. 448.

6, Moore v. Butler, 48 N. H. 161.

7, Whiton v. Snyder, 88 N. Y. 299.

8, Church v. Howard, 79 N. Y. 415; Whiton v. Snyder, 88 N. Y. 299; Faunce v. Gray, 21 Pick. 243.

§ 269. Admissions by public corporations.— When a corporation performs acts or makes declarations, either acting formally as a corporation, or informally by its officers or agents acting within the scope of their authority, such admissions like those of an individual may be offered in evidence by the adverse party. Thus where a town pays another town for supplies furnished a pauper, such payment is an implied admission of the liability, and may be proved in a subsequent

action for other supplies furnished the same pauper.¹ Of course the records of a corporation, municipal or private, are admissible in favor of the adverse party to prove such matters in the nature of admissions as they contain. It was formerly held that since the *inhabitants* of towns, parishes and other municipal and quasi-municipal corporations were parties to the action, and were interested in the result, their declarations might be received as the admissions of the corporation;² but this rule has not prevailed in the United States. Whether the action is brought in the name of the municipality or in the name of the inhabitants, the interest is deemed *too remote* to permit the corporation to be charged by the declarations of its citizens.³ Municipal corporations are compelled to act through their officers and agents; and the declarations of such officers and agents, when within the scope of their employment and accompanying their acts, are admissible as a part of the *res gestae*.⁴ When, however, the *declarations are not connected with the acts* of agency or are not of an official character, they are *hearsay* and inadmissible. Thus, the subsequent declarations of town officers are not admissible to prove the liability of the town for the repair of a highway;⁵ the declarations of the general attorney of a county that the county will pay a certain debt are not admissions against the county,⁶ and

the declarations of an alderman, while not transacting the business of the city, are not evidence against the city.⁷ In like manner a municipality is not bound by similar declarations of an overseer of the poor,⁸ of a trustee of a school district⁹ or of a moderator of a town-meeting.¹⁰ When the officers or agents of a municipal corporation have no powers or duties with respect to a given matter, their individual knowledge or the individual knowledge of the inhabitants or voters does not bind or affect the corporation.¹¹ The report of a committee appointed to inquire into a given question is not an admission of the municipality in respect thereto.¹²

1, *Sharon v. Salisbury*, 29 Conn. 113.

2, *Rex v. Hardwick*, 11 East 579; *Regina v. Adderbury*, 5 Q. B. 187; *Rex v. Whitley Lower*, 1 Maule & S. 637; *Rex v. Woburn*, 10 East. 395; 1 Greenl. Ev. sec. 175.

3, *Watertown v. Cowen*, 4 Paige 510; 27 Am. Dec. 80; *Burlington v. Calais*, 1 Vt. 385; 18 Am. Dec. 691; *Low v. Perkins*, 10 Vt. 532; 33 Am. Dec. 217; *Marvell v. Dixfield*, 30 Me. 157; *Petition of Landgraf*, 34 N. H. 163; Redf. note 1 Greenl. Ev. sec. 175.

4, *Gray v. Rollinsford*, 58 N. H. 253; *Chicago v. Greer*, 9 Wall. 726.

5, *Folsom v. Underhill*, 36 Vt. 580.

6, *Holton v. Com. of Lake Co.*, 55 Ind. 194.

7, *Mitchell v. Rockland*, 41 Me. 363; 66 Am. Dec. 252.

8, *Green v. North Butler*, 56 Pa. St. 110; *Carina v. Exeter*, 13 Me. 321.

9, *Walker v. Dunspaugh*, 20 N. Y. 170.

10, *Morrell v. Dixfield*, 30 Me. 157.

11, *Harrington v. School Dist.*, 30 Vt. 155.

12, *Collins v. Dorchester*, 6 Cush. 396; *Dudley v. Weston*, 1 Met. 477.

§ 270. Admissions by private corporations.—The same general rules stated in the last section apply in the case of private corporations. The declarations of their officers and agents are not admissible, unless they are made while acting within the scope of their authority as a part of the *res gestae* relating to the present transactions.¹ Thus, the declarations of the director of a bank or other corporation, not forming a part of any official act, are not admissible against the corporation to prove an antecedent fact;² the statement of the secretary of an insurance company, made the morning after a loss had occurred, that the property destroyed was insured at the time of the fire is not competent as the admission of the company;³ a letter of the assistant superintendent of a railroad company to a station agent relieving him of his position on the ground of negligence is not an admission of the company to prove such negligence,⁴ and the admission of a railway superintendent as to the unfitness of a conductor, made the day after the accident, is not competent evidence of the company's knowledge of such fact.⁵ In an action against a bank as gratuitous bailee of property which had been stolen by burglars, it

was held improper to receive the statement of the president, made after the loss, in which he requested a witness not to mention certain conversations in which the witness had previously warned him of the danger of the burglary.⁶ For still stronger reasons the statements of subordinate agents⁷ and those of stockholders⁸ are not admissions or the part of the corporation, unless within the rules already given, they constitute a part of the *res gestae*. But it was held that a statement made to a shipper by one who was president, general manager and controlling owner of a transportation company, that the loss had occurred through the negligence of the company was admissible;⁹ and where the general agent of a railway company, authorized to act in that capacity and having the power to settle claims against the company, informed a party that a claim which he had against the company would be paid, if in a pending suit on a similar claim it was decided that the company was liable, it was held that such declarations were competent in a suit afterwards brought on such claims.¹⁰ Under another head other illustrations will be found showing more fully when the declarations of officers and agents of private corporations are admissible as part of the *res gestae*.¹¹

1, *Huntington Ry. Co. v. Decker*, 82 Pa. St. 119; *Hamilton Co. v. Iowa Co.*, 88 Iowa 364; *Dean v. Aetna Ins. Co.*, 62 N. Y. 642; *Winchester Co. v. Creary*, 116 U. S. 161. It

must first be shown that the person in question is an officer or agent of the corporation, *Mason Fruit Jar Co. v. Paine*, 166 Pa. St. 352.

2, *Pemigewassett Bank v. Rogers*, 18 N. H. 255; *Schroepell v. Syracuse Co.*, 7 How. Pr. (N. Y.) 94; *Hogg v. Zanesville Mfg. Co.*, *Wright (Ohio)* 139; *Bank v. Davies*, 6 Watts & S. (Pa.) 285; *Franklin Bank v. Cooper*, 36 Me. 179; *Lime Rock Bank v. Hewett*, 52 Me. 531; *Chelmsford Co. v. Demerest*, 7 Gray 1; *Peek v. Detroit Novelty Works*, 29 Mich. 313.

3, *First Baptist Church v. Brooklyn Ins. Co.*, 28 N. Y. 153. The same rule applies as to admissions of liabilities by general agents, *American Ins. Co. v. Mahone*, 21 Wall. 152.

4, *Betts v. Farmers Loan & Trust Co.*, 21 Wis. 80; 91 Am. Dec. 460.

5, *Huntington Ry. Co. v. Decker*, 82 Pa. St. 119.

6, *First Nat. Bank v. Ocean Bank*, 60 N. Y. 278; 19 Am. Rep. 181.

7, *Fogg v. Pew*, 10 Gray 409; 71 Am. Dec. 662; *Bank v. Steward*, 37 Me. 519.

8, *Bank of Hartford v. Hart*, 3 Day (Conn.) 491; *Turnpike Co. v. Thorp*, 13 Conn. 173; *Mitchell v. Rome Ry. Co.*, 17 Ga. 574.

9, *Costigan v. Michael Co.*, 38 Mo. App. 219. See also, *Joseph v. Mady Clothing Co.*, 13 Mont. 195.

10, *Merchants Co. v. Leysor*, 89 Ill. 43.

11, See sec. 360 *infra*.

§ 271. Written admissions—Letters.—One of the objections generally urged against the weight of admissions as evidence is that they consist generally of casual statements, easily misunderstood or perverted. This particular objection does not exist

when the statement offered against a party consists of his written declarations; and therefore such admissions are entitled to greater weight than mere verbal admissions, unless the latter are clearly and satisfactorily proved.¹ It is a matter of constant practice to introduce letters and telegrams in evidence as constituting admissions. Of course where the letters of a party constitute a *part of the contract* and have been relied on by the other party, they are something more than admissions. They can not, like mere admissions, be explained or qualified by the writer. And letters which pass between the parties to a contract immediately before and after the transaction may be so connected with it as to become a part of the *res gestae*, and may be admissible on that ground.² But more frequently letters of a party are competent purely as admissions, and because some inference may be drawn from them unfavorable to the claim or defense of the writer.³ When the letters of a party are in the nature of admissions, they are competent, although written long *before or after the commencement of the litigation*,⁴ even though written to persons not parties to the litigation.⁵ Letters written to a party and received by him may under some circumstances be read in evidence against him, but before they can be received as admissions against him, there must be some evidence besides mere possession showing

acquiescence in their contents, as proof of some act or reply or statement;⁶ and in such case there must of course be proof that the one sought to be charged has received the letter.⁷ When one party to the litigation writes to the other giving his version of the transaction in dispute, the mere omission to reply is not to be deemed an admission of the truth of the matters stated in the letter. Not even the same inferences can be drawn in such cases as from the silence of one party in respect to statements made by the other in conversation.⁸ In such cases a *party cannot make evidence for himself* by addressing letters to the adverse party.⁹ When letters are otherwise competent as admissions, they need not be signed or actually written by the party, provided they are sent by his direction.¹⁰ If a letter contains an admission, it is admissible, although other letters in the correspondence are in the hands of the party offering the testimony and are not produced,¹¹ or although the letter offered is in reply to one not produced.¹² In such case the adverse party may, if he desire, offer such other parts of the correspondence as may be relevant.¹³

1, As to mode of proving letters and telegrams, see secs. 599 *infra*, 209 *supra*.

2, *New England Marine Insurance Co. v. DeWolf*, 8 Pick. 56; *Roach v. Learned*, 37 Me. 110; *Zachry v. Nolan*, 66 Fed. Rep. 467.

3, Snell v. Bray, 56 Wis. 156; Tapley v. Tapley, 10 Minn. 448; 88 Am. Dec. 76.

4, Snell v. Bray, 56 Wis. 156; Holler v. Weiner, 15 Pa. St. 242; State v. Watson, 31 Mo. 361.

5, Rose v. Cunynghame, 11 Ves. 550; Gibson v. Holland, L. R. 1 C. P. 1; Wilkins v. Burton, 5 Vt. 76; Robertson v. Ephraim, 18 Tex. 118.

6, Rex v. Plumer, Russ. & R. Cr. Cas. 264; Fairlie v. Denton, 3 Car. & P. 103; Com. v. Eastman, 1 Cush. 189; 48 Am. Dec. 596.

7, Com. v. Eastman, 1 Cush. 189; 48 Am. Dec. 596; Smiths v. Shoemaker, 17 Wall. 630.

8, Learned v. Tillotson, 97 N. Y. 1; 49 Am. Rep. 508. See sec. 291 *infra*.

9, Learned v. Tillotson, 97 N. Y. 1; 49 Am. Rep. 508; Robinson v. Fitchburg Ry. Co., 7 Gray 92.

10, Bartlett v. Mayo, 33 Me. 518.

11, Stone v. Sanborn, 104 Mass. 319; North Berwick Co. v. New England Ins. Co., 52 Me. 336.

12, Cary v. Pollard, 14 Allen 284; Lord Barrymore v. Taylor, 1 Esp. 326.

13, Roe v. Day, 7 Car. & P. 765; Stone v. Sanborn, 104 Mass. 319; 6 Am. Rep. 238.

§ 272. **Other writings—Corporate records.**—On principles already discussed other documents or memoranda written or authorized by a party may be offered as admissions against him like his oral statements. It is hardly necessary to enumerate the different forms of documents to which this statement applies; but receipts,¹ bills of lading,² orders,³ advertisements,⁴ maps,⁵ wills,⁶ circulars,⁷ handbills,⁸ general assignments for the benefit of

creditors⁹ and indeed writings in any form, which are proved to have emanated from or been directed by a party may be used against him as evidence, if *self-disserving* in their character.¹⁰ In like manner the *records and books of corporations* are competent as admissions when offered against them.¹¹ Such admissions may conclusively bind the corporation if third persons, having knowledge of the entries, act upon them as the records of corporate acts.¹² Corporate books are not only competent to prove admissions of the corporation, but when *officers* or members have access to such books and have probably examined them, the entries may be offered as *their admissions*. Thus, under such circumstances entries in the books of a bank were held admissible in favor of a receiver of the bank in an action against its president.¹³ It is on the same principle of supposed acquiescence in the entries contained in corporate books that they are admissible against the member in *actions on stock subscriptions* or calls,¹⁴ or in actions between members.¹⁵ But it has been held incompetent for the corporation to prove by such entries an alleged contract with a stockholder in an action against him.¹⁶ Although the stock and transfer books of corporations afford *prima facie* evidence that the persons named therein are stockholders, this may be rebutted by proof that the person in

question never accepted the stock and never actually became a stockholder.¹⁷

1, See sec. 271 *supra*.

2, Shatzel v. Hart, 2 A. K. Marsh. (Ky.) 191.

3, Macomber v. Parker, 14 Pick. 497.

4, Mann v. Russell, 11 Ill. 506; Somerell v. Hunt, 3 Har. & McH. (Md.) 113. Corporate officers are bound by corporate advertisements, Putnam v. Gunning, 162 Mass. 552.

5, Bridgeman v. Jennings, 1 Ld. Raym. 734.

6, Cowan v. Hite, 2 A. K. Marsh. (Ky.) 238.

7, Berry v. Matthews, 7 Ga. 457.

8, Dennis v. Van Voy, 31 N. J. L. 38.

9, Reed v. Newcomb, 62 Vt. 75.

10, Putnam v. Gunning, 162 Mass. 552; Potter v. Ogden, 136 N. Y. 384.

11, Holden v. Hoyt, 134 Mass. 181.

12, Holden v. Hoyt, 134 Mass. 181.

13, Olney v. Chadsey, 7 R. I. 224. See sec. 528 *infra*.

14, Peake v. Wabash Ry. Co., 18 Ill. 88; Partridge v. Badger, 25 Barb. 146; Marsh v. Colnett, 2 Esp. 665; Bavington v. Pittsburg Ry. Co., 34 Pa. St. 358; White Mts. Ry. Co. v. Eastman, 34 N. H. 124. See sec. 529 *infra*.

15, Mayor of Tuscaloosa v. Wright, 2 Port. (Ala.) 230; Chase v. Sycamore Ry. Co., 38 Ill. 215.

16, Hill v. Manchester Water Works, 2 Nev. & Mac. 573.

17, Turnbull v. Payson, 95 U. S. 421; Hoagland v. Bell, 36 Barb. 57; Plank Road v. Rice, 7 Barb. 162; Turnpike Road v. Van Ness, 2 Cranch C. C. 451; Mudgett v. Horrell, 33 Cal. 25; Coffin v. Collins, 17 Me. 440; Merrill v. Walker, 24 Me. 237.

§ 273. Same — Partnership books. —
Partnership books are presumed to be equally

under the control of the several partners, and to be kept under their direction. Therefore entries in such books are competent against the firm as admissions;¹ and in controversies between the members of the firm, such entries are competent *against each member*. They are presumed to be with his knowledge and consent,² although the *presumption may be rebutted* by proof that the partner or partners, against whom the entries are offered, have not had access to the books and have not inspected them, and that the entries are incorrect.³ Such inaccuracy may be shown, although there has been full opportunity for inspection, since there is no reason for holding the parties estopped by such entries,⁴ unless there have been settlements or accounts stated which were relied on by the parties.⁵

1, *Lodge v. Prichard*, 3 De Gex, M. & G. 906; *Smith v. Duke of Chandos*, 2 Atk. 158; *Heart v. Corning*, 3 Paige 566; *Richardson v. Wyatt*, 2 Dessaus Eq. (S. C.) 471; *Dunnell v. Henderson*, 23 N. J. Eq. 174; *Stuart v. McKichan*, 74 Ill. 122; *Cunningham v. Smith*, 11 B. Mon. (Ky.) 325; *Over v. Hetherington*, 66 Ind. 365; *Murrell v. Murrell*, 33 La. An. 1233; *Glover v. Hembree*, 82 Ala. 324; *Grant v. Masterton*, 55 Mich. 161.

2, *Withers v. Withers*, 8 Peters 355; *Kahn v. Boltz*, 39 Ala. 66; *Haller v. Willamowicz*, 23 Ark. 566; *Hale v. Brennan*, 23 Cal. 511; *Pond v. Clark*, 24 Conn. 370; *Kitner v. Whitlock*, 88 Ill. 513; *Eden v. Lingenfelter*, 39 Ind. 19; *Hunter v. Aldrich*, 52 Iowa 442; *Foster v. Fifield*, 29 Me. 136; *Wheatley v. Wheeler*, 34 Md. 62; *Topliff v. Jackson*, 12 Gray 565; *Lambert v. Griffith*, 44 Mich. 65; *Tucker v. Peaslee*, 36 N. H. 167; *Fairchild v. Fairchild*, 64 N. Y. 471; *Saunders v. Duval*, 19 Tex. 467; *Fletcher v. Pollard*, 2 Hen. & McH. (Va.) 544.

3, United States v. Binney, 5 Mason 176; Shoemaker Piano Co. v. Bernard, 2 Lea (Tenn.) 359; Over v. Hethering, 66 Ind. 365; Withers v. Withers, 8 Peters 355; Adams v. Funk, 53 Ill. 219.

4, Hunter v. Aldrich, 52 Iowa 442; Topliff v. Jackson, 12 Gray 565; Lambert v. Griffith, 44 Mich. 65; Boire v. McGinn, 8 Ore. 466; Heartt v. Corning, 3 Paige 566; Scott v. Shipherd, 3 Vt. 104.

5, Desha v. Smith, 20 Ala. 747; Pond v. Clark, 24 Conn. 370; Kitner v. Whitlock, 88 Ill. 513; Richardson v. Wyatt, 2 Dessaus Eq. (S. C.) 471.

§ 274. Admissions in pleadings.—

When parties allege matters of fact in their pleadings, these pleadings may be offered in evidence against such parties as admissions of the facts so alleged,¹ but pleadings are not in evidence nor open to comment by counsel in their argument to the jury unless they have been offered in evidence.² Such written statements are admissible on the same principle as oral admissions, hence it is not necessary that the parties should be the same; and the pleadings of a party may be received against him *in a subsequent suit although the parties are different.*³ The *weight* to be given to such admissions depends upon various circumstances. If the pleading is sworn to and hence is the deliberate and solemn statement of the party, its admissions may afford evidence against him not easily rebutted.⁴ When the allegations are made on information and belief, they are still admissible in evidence, as this fact only detracts from the

weight of the testimony.⁵ But if the pleadings are not sworn to, and are drawn by counsel, and the allegations have not been expressly directed or approved by the party, they may be of little significance, if admitted at all.⁶ Indeed, under the former practice it was held that *bills in chancery not sworn to* were not admissible, except to prove such a fact as their own existence, or the commencement of a suit, or what the facts in issue were. They were rejected, as admissions, on the ground that they consisted largely of the suggestions of counsel so framed as to obtain an answer under oath.⁷ And the pleadings in actions at law have also often been rejected as admissions, when not shown to have been approved or directed by the party himself.⁸ When the pleading drawn by an attorney consists of formal allegations which may be presumed to have been made without special instructions from the client, it is not competent; but particular and specific allegations which cannot be presumed to have been made under the general authority of the attorney, but which obviously were drawn from specific instructions are competent.⁹ Of course the answer or plea of a party in equity, if sworn to, is competent against him as an admission in another action.¹⁰ Under the modern system of pleading all pleadings containing allegations of fact would seem to be competent for such purpose, if sworn to or

otherwise shown to have been adopted by the party.¹¹

1, *Ayers v. Hartford Ins. Co.*, 17 Iowa 176; 85 Am. Dec. 553; *Farsons v. Copeland*, 33 Me. 370; 54 Am. Dec. 628; *Bliss v. Nichols*, 12 Allen 443; *Fite v. Black*, 92 Ga. 363; *Com. v. Goddard*, 2 Allen, 148; *Meade v. Black*, 22 Wis. 241.

2, *Taft v. Fisk*, 140 Mass. 250.

3, *Radclyffe v. Barton*, 161 Mass. 327; *Printup v. Patton*, 91 Ga. 422; *Ayers v. Hartford Ins. Co.*, 17 Iowa 176; 85 Am. Dec. 553; *Rich v. Minneapolis*, 40 Minn. 82.

4, *Cook v. Barr*, 44 N. Y. 156; *Elliott v. Hayden*, 104 Mass. 180; *Pope v. Allis*, 115 U. S. 363; *Balloch v. Hooper*, 146 U. S. 363.

5, *Pope v. Allis*, 115 U. S. 363.

6, *Ferris v. Hard*, 135 N. Y. 354; *Baldwin v. Gregg*, 13 Met. 253; *Boileau v. Rutlin*, 2 Exch. 665. But see, *Pearre v. Lamar*, 90 Ga. 377.

7, *Boileau v. Rutlin*, 2 Exch. 665; *Doe v. Sybourn*, 7 T. R. 3.

8, *Boileau v. Rutlin*, 2 Exch. 665; *Delaware Co. v. Diebold Safe Co.*, 133 U. S. 473; *Baldwin v. Gregg*, 13 Met. 253; *Dennie v. Williams*, 135 Mass. 28.

9, *Johnson v. Russell*, 144 Mass. 409; *Fairbanks v. Badger*, 46 Ill. App. 644. Contra, *Guy v. Manuel*, 89 N. C. 83.

10, *Barry v. Barry*, 3 Cranch C. C. 120; *M'Gown v. Young*, 2 Stew. (Ala.) 160; *Lunday v. Thomas*, 26 Ga. 537; *Blen v. Witherspoon*, 2 Miss. 28; *Rees v. Lawless*, 4 Litt. (Ky.) 218; *Earl v. Shoulder*, 6 Ohio 409.

11, *Delaware Co. v. Diebold Safe Co.*, 133 U. S. 473; *Callan v. McDaniel*, 72 Ala. 96; *Beale v. Brown*, 6 Mackey (D. C.) 574; *Buzard v. McAnulty*, 77 Tex. 438; *Kankakee Co. v. Horan*, 131 Ill. 288. As to judicial records see sec. 637 *infra*.

275. Same, continued.—On the same principle where amended pleadings have

been filed, allegations in the original pleadings have been still held admissible,¹ but in such case the original pleadings can have no effect, unless formally offered in evidence.² It is hardly necessary to add that the pleading of one plaintiff or defendant is not competent as an admission of a *co-plaintiff* or *co-defendant*.³ It is an ancient rule of pleading that each party tacitly admits all such traversable allegations on the opposite side as he does not traverse. *Qui non negat fatetur*.⁴ Under the reformed procedure the same general rule is recognized with the qualification that the allegation of new matter in an answer, not pleaded as a part of a counter-claim or as new matter in a reply, is to be deemed controverted by the adverse party. It is a familiar statement that a *demurrer* admits all those facts which are well pleaded. But as a rule of evidence a demurrer is not an absolute admission of any fact. It simply admits those facts which are well pleaded for the sole purpose of having their legal sufficiency determined by the court.⁵ The demurrer cannot be used in another suit as an admission of the allegations in the pleading demurred to, when it does not appear that the demurrer was adjudged insufficient, and that the party elected to abide thereby.⁶ The statements in the pleadings demurred to are no evidence on questions of damages, or

when the cause is tried on the merits.⁷ But for the purpose of determining the questions of law involved, a demurrer to evidence admits all the facts which a jury might reasonably infer from the evidence.⁸

1, *Bailey v. O'Bannon*, 28 Mo. App. 39; *Murphy v. St. Louis T. Fund*, 29 Mo. App. 541; *Brown v. Pickard*, 4 Utah 292; *Hall v. Woodward*, 30 S. C. 564; *Barton v. Laws*, 4 Col. App. 212; *Juneau v. Stunkel*, 40 Kan. 756; *Peckham Iron Co. v. Harper*, 41 Ohio St. 100; *Daub v. Englebach*, 109 Ill. 267; *Coward v. Clanton*, 79 Cal. 23; *Baltimore, O. & C. Ry. v. Evarts*, 112 Ind. 533; *Folger v. Boyington*, 67 Wis. 447.

2, *Folger v. Boyington*, 67 Wis. 447.

3, *Reese v. Reese*, 41 Md. 554; *Stewart v. Stone*, 3 Gill & J. (Md.) 514.

4, *Gwam v. Roe*, 1 Salk. 91; *Gould Pl.* (5th ed.) 141.

5, *Pease v. Phelps*, 10 Conn. 62; *Branham v. Mayor*, 24 Cal. 585; *Chapin v. Curtis*, 23 Conn. 388; *Matthews v. Tower*, 59 Vt. 433; *Coxe v. Gulick*, 10 N. J. L. 328; *Bobe v. Frowner*, 18 Ala. 89.

6, *Kankakee Co. v. Horan*, 131 Ill. 288; *Tompkins v. Asbey*, 1 Moody & M. 32.

7, *McKinzie v. Matthews*, 59 Mo. 99.

8, *Golden v. Knowles*, 120 Mass. 336; *Fowle v. Common Coun. of Alexandria*, 11 Wheat. 320.

§ 276. Admissions in pleadings—
When conclusive.—Each party to an action is in that action conclusively bound by those admissions which he expressly makes in the pleadings, or by stipulations, oral or written, which are formally entered into for the purposes of dispensing with proofs.¹ As we have already seen, the same rule applies

to those material allegations in pleadings which are tacitly admitted by failing to interpose any denial when, under the rules of pleading, a denial is necessary.² But a tacit or incidental admission in one suit will *not conclude* the party making it *in another action*, where precisely the *same matter is not in litigation*;³ and even then admissions which are expressly made by the pleadings in one action are not conclusive in other suits, unless the second action is brought on a judgment recovered in the first.⁴ The affidavits and depositions of a party are of course competent to show his admissions, although used in another suit, and from their solemn character are entitled to great weight;⁵ but they are not conclusive against him and do not constitute an estoppel.⁶ *Admissions* made by parties or their attorneys in their pleadings in the action, or by stipulations as to facts, or by dispensing with certain proofs *may be withdrawn* if not true, provided there remains sufficient time for the other party in which to prepare his case, and provided such party has not been injured by relying on such admissions.⁷ Such admissions will not be allowed to be withdrawn, however, if the situation of the parties has been substantially changed, as by the death of a party or of a witness.⁸ If a party desires to withdraw admissions of the character under discussion, he should give full and timely notice of his pur-

pose so that the other party may have reasonable time to supply the proof.⁹ And if such notice is given, the court in its discretion may relieve the party from the conclusive effect of the admission, if it is shown to have been made through mistake.¹⁰

1, *Boileau v. Rutlin*, 2 Exch. 665; *Robins v. Lord Maidstone*, 4 Q. B. 811; Best Ev. sec. 541.

2, See sec. 275 *supra*.

3, *Carter v. James*, 13 M. & W. 137; *Rigge v. Burbidge*, 15 M. & W. 598; *Hutt v. Morrell*, 3 Exch. 241.

4, *Skelton v. Hawling*, 1 Wils. 258.

5, *Rex v. Clarke*, 8 T. R. 220; *Doe v. Steele*, 3 Camp. 115; *Forrest v. Forrest*, 6 Duer (N. Y.) 102; *Fulton v. Gracey*, 15 Gratt. (Va.) 314; *Illinois Cent. Ry. Co. v. Cobb*, 64 Ill. 143; *Trustees v. Bledsoe*, 5 Ind. 133; *Davenport v. Cummings*, 15 Iowa 219; *Mushat v. Moore*, 4 Dev. & B. (N. C.) 124. As to the effect of answers under oath, see *Elliott v. Hayden*, 104 Mass. 180; *Knowlton v. Moseley*, 105 Mass. 136; *Cook v. Barr*, 44 N. Y. 156; *Dunbar v. Dunbar*, 80 Me. 152; 6 Am. St. Rep. 166; *Wylde v. Crane*, 53 Ill. 490; *Lawrence v. Lawrence*, 21 N. J. Eq. 317; *Printup v. Patton*, 91 Ga. 422.

6, *Doe v. Steel*, 3 Comp. 115; *Cameron v. Lightfoot*, 2 W. Black. 1190; *Studdy v. Sanders*, 2 Dowl. & R. 347; *De Whelpdale v. Milburn*, 5 Price 485.

7, *Wallace v. Matthews*, 39 Ga. 617; 99 Am. Dec. 473.

8, *Wilson v. Bank of La.*, 55 Ga. 98.

9, *Hargraves v. Redd*, 43 Ga. 150; *Elton v. Larkins*, 5 Car. & P. 385.

10, *Holley v. Young*, 68 Me. 215; 28 Am. Rep. 40; *Perry v. Simpson W. M. Co.*, 40 Conn. 313.

§ 277. **Estoppel by conduct.** — Although in the foregoing sections some of the

admissions referred to have been shown to be conclusive upon the party making them and those in privity with him, by far the greater part were of the class known as casual admissions having no element of estoppel and of course liable to be rebutted. But it has long been recognized as the rule that there is another class of admissions which can not be disputed; and the rule is the same whether the admission is in fact true or false. The test is not whether the admission is true, but whether it would be contrary to public policy and good morals to allow it to be disputed. One branch of the rule of estoppel by conduct is thus stated by Mr. Stephen: "When one person by anything which he does or says, or abstains from doing or saying intentionally causes or permits another person to believe a thing to be true and to act upon such belief otherwise than he would have acted but for that belief, neither the person first mentioned nor his representative in interest is allowed, in any suit or proceeding between himself and such person or his representative in interest, to deny the truth of that thing."¹ Thus, where an owner acquiesces in the *sale of property*, as if it were that of another, and by his conduct leads innocent purchasers to buy, he is estopped to claim the property as his own;² and if an owner stands by and sees a third person sell property as his own, without asserting his own

title or giving the purchaser any notice of it, he is estopped as against such purchaser from asserting it afterwards.³ In an action by an indorsee against an indorser who has stated to the plaintiff that the signature as indorser is genuine, the defendant is estopped to deny his obligation after the plaintiff has relied on such statement and lost his remedy against the maker by reason of his insolvency;⁴ and where one adopts a signature, knowing it to be forged, he is estopped from denying its genuineness.⁵ The same rule of estoppel is applied where a third person buys a note or mortgage or other claim relying on the assurance of the maker or debtor that the claim is valid, or that there is no defence.⁶ But there is no estoppel where the statement is made after the purchaser has become the owner, although the purchaser repeats the statement to one who buys of him.⁷ The rule under discussion applies where the maker of a note stands by in silence, when it is transferred for a consideration;⁸ where the owner of a chattel mortgage, knowing that the mortgagor is endeavoring to obtain a loan, conceals the existence of his mortgage to aid him in such purpose;⁹ where the owner of land, by his words or acts, leads the public to suppose and to act on the belief that he has dedicated land for a street or other public use,¹⁰ and where one person owning an estate stands by and sees another erect improvements on it in

the belief that he has title thereto, and does not inform the party of his own title.¹¹

1, Steph. Ev. art. 102.

2, Pickard v. Sears, 6 Adol. & Ell. 469; Stephens v. Baird, 9 Cow. 274; Mason v. Williams, 8 Jones (N. C.) 478.

3, Vilas v. Mason, 25 Wis. 310; Guffey v. O'Reiley, 88 Mo. 418; 57 Am. Rep. 424 and note; Pool v. Lewis, 41 Ga. 162; 5 Am. Rep. 526; Rice v. Bunce, 49 Mo. 231; 8 Am. Rep. 129; Markham v. O'Connor, 52 Ga. 183; 21 Am. Rep. 249; Nevin v. Belknap, 2 Johns. 573; Guthrie v. Quinn, 43 Ala. 561; Hope v. Lawrence, 50 Barb. 258; Engle v. Burns, 5 Call (Va.) 463; 2 Am. Dec. 593; Storrs v. Barker, 6 Johns. Ch. (N. Y.) 166; 10 Am. Dec. 316; Henderson v. Overton, 2 Yerg. (Ienn.) 394; 24 Am. Dec. 492; Kid v. Mitchell, 1 Nott & McC. (S. C.) 334; 9 Am. Dec. 702; Marines v. Goblet, 31 S. C. 153; 17 Am. St. Rep. 22 and note; Powers Appeal, 125 Pa. St. 175; 11 Am. St. Rep. 882 and note; Big. Estoppel, 492-504. See note, 57 Am. Rep. 429.

4, Fall River Nat. Bank v. Buffington, 97 Mass. 498.

5, Casco Bank v. Keene, 53 Me. 103; Rudd v. Matthews, 79 Ky. 479; 42 Am. Rep. 231; Shisler v. Vandike, 92 Pa. St. 447; 37 Am. Rep. 702 and note.

6, Petrie v. Feeter, 21 Wend. 172; Cloud v. Whiting, 38 Ala. 57; Preston v. Mann, 25 Conn. 118; Vanderpool v. Brake, 28 Ind. 130; Smith v. Stone, 17 B. Mon. (Ky.) 168; Crout v. De Wolf, 1 R. I. 393; Libbey v. Pierce, 47 N. H. 309; Hamer v. Johnston, 6 Miss. 698; Foster v. Newland, 21 Wend. 94; Cary v. Wheeler, 14 Wis. 281; Marr v. Howland, 20 Wis. 282; Gill v. Rice, 13 Wis. 549; Lesley v. Johnson, 41 Barb. 359; Weyh v. Boylan, 85 N. Y. 394; 39 Am. Rep. 669.

7, Ray v. McMurtry, 20 Ind. 307; 83 Am. Dec. 322 and note; Windle v. Canaday, 21 Ind. 248; 83 Am. Dec. 348 and long note.

8, Watson v. McLaren, 19 Wend. 557;

9, McLean v. Dow, 42 Wis. 610; Chapman v. Hamilton, 19 Ala. 121.

10, *Cincinnati v. White's Lessee*, 6 Peters 431; *Morgan v. Chicago & A. Ry. Co.*, 96 U. S. 716; *Holdane v. Cold Spring*, 21 N. Y. 474; *Wilder v. St. Paul*, 12 Minn. 192; *Kyle v. Logan*, 87 Ill. 64; *Kelley v. Chicago*, 48 Ill. 388; 2 Dill. Mun. Corp. sec. 632.

11, *Steel v. Smelting Co.*, 106 U. S. 456; *McCormick v. McMurtrie*, 4 Watts (Pa.) 192; *McKelvey v. Truby*, 4 Watts & S. (Pa.) 323; *Beaupland v. McKeen*, 28 Pa. St. 124; 70 Am. Dec. 115; *Forbes v. McCoy*, 24 Neb. 702; *Helm v. Wilson*, 76 Cal. 477. See note, 11 Am. St. Rep. 22.

§ 278. **Same — Corporations—Co-partners — Husband and wife.**—The principle under discussion is often illustrated in the law of corporations. Thus, where a person has treated an association as a corporation by making contracts with it in its assumed corporate capacity, he cannot, when sued on the contract after enjoying the benefit of the contract, give evidence to show that the plaintiff has no corporate existence;¹ nor can a company which has executed notes or mortgages or other contracts, while assuming to act in a corporate capacity, be allowed to prove in an action against it on such contracts that there has been no legal incorporation.² In *actions on subscriptions to stock*, where the rights of creditors of the corporation are involved, the shareholder is estopped from proving that the corporation has no legal existence;³ and where a *stockholder has attended meetings* of an association, claiming to act in a corporate capacity, or where he has in other ways held himself out as a mem-

ber, he is estopped to deny such membership or his liability as a member as against those who have relied on such acts.⁴ A familiar illustration of estoppel by conduct is that, where one holds himself out as a *partner* and thereby induces others to act on the faith of such act or representation, he cannot be heard to prove that no such partnership in fact existed;⁵ and where a retiring partner gives no notice to persons who continue to give credit supposing him to be a member of the firm, he cannot deny that he is a partner as far as their interests are thereby affected.⁶ Another familiar example is that arising out of the relation of *husband and wife*. Where a man cohabits with a woman or by other conduct leads the public to suppose that they are married, he will not be heard to prove against those who have given credit on the faith of such representations or acts, that they are not in fact married.⁷ Under similar circumstances a woman may be estopped to deny that she is married, when third persons have been led to rely on her representations to their injury.⁸

1, *Palmer v. Lawrence*, 3 Sandf. (N. Y.) 161; *Douglas v. Bolles*, 94 U. S. 104; *Franklin v. Twogood*, 18 Iowa 515; *Worcester Med. Inst. v. Harding*, 11 Cush. 285; *West Winsted Sav. Bank v. Ford*, 27 Conn. 282; 71 Am. Dec. 66; *Newburg Petroleum Co. v. Weare*, 27 Ohio St. 343; *McFarlan v. Triton Ins. Co.*, 4 Den. 392; *Jones v. Kokomo Bld. Ass.*, 77 Ind. 340; *Alexander v. Tolleston Club*, 110 Ill. 65; *St. Louis v. Shields*, 62 Mo. 247; *Grant v. Henry*

Clay Coal Co., 80 Pa. St. 208; Butchers Bank v. McDonald, 130 Mass. 264.

2, *Aller v. Cameron*, 3 Dill. (U. S.) 198; *Dooley v. Cheshire Glass Co.*, 15 Gray 494; *Empire Mfg. Co. v. Stuart*, 46 Mich. 482; *Racine Ry. Co. v. Farmers L. & T. Co.*, 49 Ill. 346; 95 Am. Dec. 595; *Stone v. Berkshire Soc.*, 14 Vt. 86; *Rush v. Halcyon Steamboat Co.*, 84 N. C. 702; *Keynolds v. Myers*, 51 Vt. 444; *Com. v. Worcester Turnpike Cor.*, 3 Pick. 327. Contra, *Boyce v. Towsontown*, 46 Md. 359.

3, *Eaton v. Aspinwall*, 19 N. Y. 119; *Frost v. Walker*, 60 Me. 468; *Wheelock v. Kost*, 77 Ill. 296; *Hager v. Cleveland*, 36 Md. 476; *Holyoke Bank v. Goodman Paper Co.*, 9 Cush. 576; *Walworth v. Brackett*, 98 Mass. 98. See also, *Utleigh v. Union Tool Co.*, 11 Gray 139; *Gaff v. Flesher*, 33 Ohio St. 107; *Central Agr. Ass. v. Alabama Ins. Co.*, 70 Ala. 120; *Keyser v. Hitz*, 2 Mackey (D. C.) 473.

4, *Erie Co. v. Brown*, 25 Pa. St. 156; *Sanger v. Upton*, 91 U. S. 56; *Wheeler v. Millar*, 90 N. Y. 353; *Boston Ry. Co. v. Wellington*, 113 Mass. 79; *Clark v. Farrington*, 11 Wis. 306; *Jewell v. Rock River Co.*, 101 Ill. 57; *Haynes v. Brown*, 36 N. H. 545; *Chaffin v. Cummings*, 37 Me. 76; *Griswold v. Seligman*, 72 Mo. 110; *Musgrave v. Morrison*, 54 Md. 161; *Cheltenham Ry. Co. v. Daniel*, 2 Q. B. 281; *West Cornwall v. Mowatt*, 15 Q. B. 521; *Cook Stock & Stockhold.* sec. 52.

5, *Pickard v. Sears*, 6 Adol. & Ell. 469; *Freeman v. Cooke*, 2 Exch. 654; *Carr v. London & N. W. Ry. Co.*, L. R. 10 C. P. 316; *Parchen v. Anderson*, 5 Mont. 438; 51 Am. Rep. 65; *Beecher v. Bush*, 45 Mich. 188; 40 Am. Rep. 465; *Sun Ins. Co. v. Kountz Line*, 122 U. S. 583; Lindl. Part. p. 40.

6, *Lovejoy v. Spafford*, 93 U. S. 430; *Freeman v. Cooke*, 2 Exch. 661; *Austin v. Holland*, 69 N. Y. 571; 25 Am. Rep. 246.

7, *Watson v. Threlkeld*, 2 Esp. 637; *Robinson v. Nahon*, 1 Camp. 245; *Munro v. De Chemant*, 4 Camp. 216; *Ryan v. Sams*, 12 Q. B. 460; *Blades v. Free*, 9 Barn. & C. 167; *Edwards v. Farebrother*, 2 Moore & P. 293; *Ponder v. Graham*, 4 Fla. 23; *Young v. Foster*, 14 N. H. 114; *Gathings v. Williams*, 5 Ired. (N. C.) 487; *Johnston v. Allen*, 39 How. Pr. (N. Y.) 506. See note, 96 Am. Dec. 214.

8, 2 Pom. Eq. Juris. sec. 814; Stew. Mar. & Div. sec. 47; Mace v. Codell, 1 Cowp. 232. See note, 96 Am. Dec. 214. But in a controversy between a man and a woman in respect to property there is no such estoppel, if neither believed a valid marriage to exist, Robbins v. Potter, 98 Mass. 532; Gathings v. Williams, 5 Ired. (N. C.) 487; 44 Am. Dec. 49; Allen v. Wood, 1 Bing. N. C. 8. Contra, Johnson v. Johnson, 1 Cold. (Tenn.) 626. As to estoppel in an action to annul a marriage, see 1 Bish. Mar. & Div. sec. 300; and also note, 96 Am. Dec. 215.

§ 279. Same — When admissions are in good faith and by mistake. — It may be inferred from the illustrations already given that before an estoppel can arise from the conduct of an individual there must be some fault on his part. Said Justice Field: "There must be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence on his part as to amount to constructive fraud." ¹ While it is not in all cases necessary to show actual knowledge of the facts on the part of the one against whom the estoppel is claimed, it should at least be shown that the declarations were made under such circumstances that he ought to have had such knowledge or that they were made negligently and recklessly. ² When a person through misapprehension, ignorance or inadvertence does acts or makes declarations which mislead another to his injury, but when at the same time there is *no willful deception or culpable negligence* and no intention that the representation should be acted upon as true by the other party, and when

nothing accompanies it that is equivalent to a promise that the representation is true, the person making the declarations or doing the acts is not estopped from proving the truth against the party thus misled.³ It follows that there is no estoppel when the declarations are made in good faith and in ignorance of the real facts, in other words, when made innocently and by mistake.⁴

1, *Henshaw v. Bissell*, 18 Wall. 255.

2, *Leather Mfg. Bank v. Morgan*, 117 U. S. 96; *Weinstein v. National Bank*, 69 Tex. 38; *Coleman v. Pearce*, 26 Minn. 123; *Madison Co. v. Paxton*, 57 Miss. 701; *Mutual Ins. Co. v. Norris*, 31 N. J. Eq. 583; *Davenport Ry. Co. v. Davenport Gas Co.*, 43 Iowa 301; *Wright v. Newton*, 130 Mass. 552; *Greene v. Smith*, 57 Vt. 268.

3, *Danforth v. Adams*, 29 Conn. 107.

4, *Brewer v. Boston & W. Ry. Co.*, 5 Met. 478; 39 Am. Dec. 694; *Henshaw v. Bissell*, 18 Wall. 255; *Brown v. Bowen*, 30 N. Y. 541; 86 Am. Dec. 406; *Thrall v. Lathrop*, 30 Vt. 307; 73 Am. Dec. 306.

§ 280. Same — Erection of improvements — Boundary lines.—A party is not estopped from claiming his property by reason of seeing improvements erected upon it¹ or by seeing it sold to others,² if the purchaser knows that the property belongs to such first party. As was said by Chief Justice Dixon in a Wisconsin case: "One essential element of every equitable estoppel, by which a man is to be precluded from claiming what is his own, is that the purchaser and party claiming the benefit of such estoppel should

have been ignorant of the true state of title." ³ Nor in general does any estoppel arise from acquiescence through mistake of fact as to an erroneous boundary line; ⁴ and it has been frequently held that where there is an agreement or acquiescence in a wrong boundary, when the true boundary can be ascertained from the deed, neither party is estopped from claiming to the true line. ⁵ But there are other cases in which long acquiescence in a boundary line, accompanied with improvements or other acts showing reliance on such boundary, has been held equivalent to knowledge of the facts, and it was there held to constitute an estoppel, even though there was actual mistake. ⁶

1, *Brewer v. Boston Ry. Co.*, 5 Met. 478; 39 Am. Dec. 694.

2, *Brown v. Tucker*, 47 Ga. 485; *Hale v. Skinner*, 117 Mass. 474; *Greene v. Smith*, 57 Vt. 268.

3, *Hass v. Plautz*, 56 Wis. 105; 43 Am. Rep. 699; *Gove v. White*, 20 Wis. 425.

4, *Brewer v. Boston & W. Ry. Co.*, 5 Met. 478; 39 Am. Dec. 694; *Ramsden v. Dyson*, L. R. 1 H. L. 129, 140; *Sheridan v. Barrett*, 4 L. R. Ir. 223; *Hass v. Plautz*, 56 Wis. 105; 43 Am. Rep. 699; *Reed v. McCourt*, 41 N. Y. 435; *Lemon v. Hartsook*, 80 Mo. 13; *Kirchner v. Miller*, 39 N. J. Eq. 355; *Pitcher v. Dove*, 99 Ind. 175; *Davenport v. Tarpin*, 43 Cal. 597; *Evans v. Miller*, 58 Miss. 120; 38 Am. Rep. 313.

5, *Hartung v. Witte*, 59 Wis. 285; *Liverpool Wharf v. Prescott*, 7 Allen 494; *Hass v. Plautz*, 56 Wis. 105; 43 Am. Rep. 699.

6, *Adams v. Rockwell*, 16 Wend. 285; *Chicago Ry. Co. v. People*, 91 Ill. 251; *Hagey v. Detweiler*, 35 Pa. St. 409;

McCormick v. Barnum, 10 Wend. 104; *Stosser v. Ft. Wayne*, 100 Ind. 443. For illustrations of the subject see note, 38 Am. Rep. 315.

§ 281. **Same — The act must be calculated to mislead and must actually mislead.**—Before a person can avail himself of an estoppel arising from the conduct or declarations, of another, he must show that he was himself destitute of knowledge of the true state of the facts. If either he knows the facts, or the circumstances are such that he ought to know the facts, he is in no situation to claim the benefit of an estoppel.¹ Before a person is estopped to deny the truth of his representations, it should either be shown that he actually means to have such representations relied upon, or that they were made under such circumstances that such intention on his part might be reasonably inferred;² in other words, the proof of the intent may be either direct or presumptive.³ It follows that there need not be an actual design to mislead. It is enough that the act or representation is calculated to mislead and does mislead the other party to his disadvantage while acting in good faith and with reasonable care and diligence.⁴

1, *Brant v. Virginia Coal Co.*, 93 U. S. 326; *Smith v. Kremer*, 71 Ill. 185; *Logansport v. La Rose*, 99 Ind. 117; *Robbins v. Potter*, 98 Mass. 532; *Hutchins v. Hebard*, 34 N. Y. 24; *Kingman v. Graham*, 51 Wis. 232.

2, *Freeman v. Cooke*, 2 Exch. 654; *Leather Mfg. Co. v.*

Morgan, 117 U. S. 96; Blair v. Wait, 69 N. Y. 113; Kingman v. Graham, 51 Wis. 232.

3, See cases last cited.

4, Blair v. Wait, 69 N. Y. 113; Manufacturers' Bank v. Hazard, 30 N. Y. 226.

§ 282. **Who may claim benefit of estoppel.**—Persons for whom the representations are not intended and to whom they are not addressed cannot claim the benefit of an estoppel based on such representations.¹ Thus, the declaration of A to B, not made with the purpose or belief that it would be communicated to C, or would influence his action, constitutes no estoppel upon A, although C afterwards hears of it and acts upon it.² But conduct or declarations may be of so *general* or *notorious* a character that the public generally may assume that they are intended to be relied upon, as where a man publicly treats a woman as his wife, or an associate as his partner.³ An estoppel *in pais* operates only in favor of the person who has been *misled* to his injury; and he only can set it up.⁴ Thus where an account is rendered, and the other party does not accept it, and in no way changes his situation, there is no estoppel from claiming a larger sum;⁵ and in an action for false imprisonment where the defendant, an officer, had only a copy of the warrant, it was held that he was not estopped from showing this fact, as the plaintiff had not acted upon

any representation although he had been led to suppose that the officer had the original.*

1, *Kinney v. Whiton*, 44 Conn. 62; 26 Am. Rep. 462; *Morgan v. Spangler*, 14 Ohio St. 102; *Durant v. Pratt*, 55 Vt. 270.

2, *Mayenborg v. Haynes*, 50 N. Y. 675. The party may be estopped if the declaration is not confidential, but general and acted on by others, *Nutshell v. Reed*, 9 Cal. 204; 70 Am. Dec. 647.

3, See secs. 86 *et seq. supra*; also sec. 278.

4, *Ketchum v. Duncan*, 96 U. S. 659; *Butchers Assn. v. Boston*, 139 Mass. 290; *Winegar v. Fowler*, 82 N. Y. 315; *Guichard v. Brande*, 57 Wis. 534; *Townsend Bank v. Todd*, 47 Conn. 190; *Earl v. Stevens*, 57 Vt. 474; *Lawrence v. Towle*, 59 N. H. 28; *Maxwell v. Bay City Co.*, 46 Mich. 278; *Illinois Masons Soc. v. Baldwin*, 86 Ill. 479; *Spurlock v. Sproul*, 72 Mo. 503; *Stringer v. Northwestern Ins. Co.*, 82 Ind. 100.

5, *Stryker v. Cassidy*, 76 N. Y. 50; 32 Am. Rep. 262.

6, *Howard v. Hudson*, 2 El. & B. 1

§ 283. **Estoppel by deed.**—It will elsewhere appear in the discussion of the effect of judgments as evidence that in some cases the law attaches an artificial effect to certain classes of evidence.¹ The same principle will now be illustrated in respect to recitals and statements in deeds; and it will be found that such recitals are not, like casual admissions, judged by their intrinsic weight as evidence, but that, under the limitations to be named, they *conclusively bind the parties and their privies*. It has long been a familiar rule of the law that parties may, by executing instruments under seal, conclude themselves

from disproving or contradicting, by any evidence of less solemnity, the statements contained therein.² Said Lord Mansfield: "No man shall be allowed to dispute his own solemn deed."³ Thus, a specific *recital* in a deed that the grantor has title to or that he is in possession of the land conveyed will estop him from asserting the contrary as against the grantee. In other words, the grantor is estopped from saying that he had no interest in the land.⁴ Where the deed describes the land conveyed as bounded by a street, the parties to the conveyance are estopped to deny the existence of the street.⁵ The recital of a lease in a deed of release is conclusive evidence of the existence of the lease against the parties and all others claiming under them in privity of estate.⁶ One who holds under a deed, which by its terms is subject to a prior mortgage, is estopped from questioning the consideration or validity of such mortgage.⁷ So it has been held that the grantor is estopped to deny the recitals of due notice of a sale,⁸ of an authority stated to have been given by a corporation,⁹ of the taking an oath of office,¹⁰ or that certain conveyances have been made to him.¹¹ On the same principle, "it is settled that no one who has bound himself by an instrument under seal for the fidelity and good conduct of another in a private trust or public duty can escape from liability under cover of an

allegation that his principal was not duly designated or elected, or was subject to some legal disqualification which should have prevented him from accepting or administering the office." ¹² Thus, sureties on the bonds of administrators, guardians, sheriffs and the like are estopped to deny that the principal held the designated office. ¹³

1, See secs. 601 *et seq. infra*.

2, San Antonio v. Mehaffy, 96 U. S. 312; Insurance Co. v. Bruce, 105 U. S. 328; Carver v. Jackson, 4 Peters 1; Beckett v. Bradley, 7 Man. & G. 994; Young v. Raincock, 7 C. B. 310, 338; Haggart v. Morgan, 5 N. Y. 422; 55 Am. Dec. 350; Dock Co. v. Leavitt, 54 N. Y. 35; Francis v. Boston Mill Co., 4 Pick. 365; Dyer v. Rich, 1 Met. 180; Stow v. Wyse, 7 Conn. 214; 18 Am. Dec. 99; Box v. Lawrence, 14 Tex. 545; Usina v. Wilder, 58 Ga. 178; Graves v. Colwell, 90 Ill. 612; La Strange v. State, 58 Md. 26; Cutler v. Supervisors, 56 Miss. 115; Hundley v. Filbert, 73 Mo. 34; Wilson v. Land Co., 77 N. C. 445; Gudtner v. Kilpatrick, 14 Neb. 347;

3, Goodtitle v. Bailey, Cowp. 601.

4, Williams v. Society, 1 Ohio St. 478; Hannon v. Christopher, 34 N. J. Eq. 459; 3 Washb. Real Prop. 106.

5, Donohoo v. Murray, 62 Wis. 100; Fox v. Union Refining Co., 109 Mass. 292; Parker v. Smith, 17 Mass. 413; 9 Am. Dec. 157.

6, Shelley v. Wright, Willes 9; Crane v. Morris, 6 Peters 611; Carver v. Jackson, 4 Peters 1, 83; Cossens v. Cossens, Willes 25; 1 Greenl. Ev. sec. 23. But not upon strangers, or those claiming paramount to the deed, Carver v. Jackson, 4 Peters 1, 83.

7, Freeman v. Thomas, 44 N. Y. 50; Johnson v. Thompson, 129 Mass. 398; Tuite v. Stevens, 98 Mass. 305; Smith v. Graham, 34 Mich. 302.

8, Simson v. Eckstein, 22 Cal. 580.

9, *Stowe v. Wyse*, 7 Conn. 214; 18 Am. Dec. 99; *McDonald v. King*, 1 N. J. L. 432.

10, *Larco v. Casanuevara*, 30 Cal. 560.

11, *Kinsman v. Lewis*, 11 Ohio 475; *Rangeley v. Spring*, 28 Me. 142; *Farrar v. Cooper*, 34 Me. 401; *McDonald v. King*, 1 N. J. L. 432.

12, 2 Smith L. C. (8th Am. ed.) 819; *People v. McCumber*, 27 Barb. 632; *Seiple v. Elizabeth*, 3 Dutch. (N. J.) 407; *People v. Norton*, 9 N. Y. 176; *Hayden v. Smith*, 40 Conn. 83; *Meyer v. Wiltshire*, 92 Ill. 395; *Gray v. State*, 78 Ind. 68; 41 Am. Rep. 545; *State v. Mills*, 82 Ind. 126; *Phoenix Ins. Co. v. Findlay*, 59 Iowa 59; *Jones v. Gallatin*, 78 Ky. 491; *Williamson v. Woodman*, 73 Me. 163; *Taylor v. State*, 51 Miss. 79; *Kelly v. State*, 25 Ohio St. 567; *McClure v. Com.*, 80 Pa. St. 167.

13, *Cutler v. Dickinson*, 8 Pick. 386; *Bruce v. United States*, 17 How. 437; *Schroyer v. Richmond*, 16 Ohio St. 455; *Norris v. State*, 22 Ark. 524; *Cox v. Thomas*, 9 Gratt. (Va.) 312; *Jones v. Gallatin*, 78 Ky. 491; *State v. Mills*, 82 Ind. 126; *Williamson v. Woodman*, 73 Me. 163. But see, *Conant v. Newton*, 126 Mass. 105.

§ 284. **Same — Title subsequently acquired — Mutuality and privity.**— It is a well known illustration of this principle of estoppel by deed that, if a grantor undertakes to convey the fee with full warranties when he in fact has no title, and he subsequently acquires title, such title forthwith inures to the benefit of the grantee to the same extent as if the grantor had had the title at the date of the grant.¹ In such case the grantor and his heirs are precluded from asserting the title as against the grantee and those in privity with him.² As in the case of judgments, *only* those who are *parties* to the deed,

or who are *in privity* with such parties, are bound by its recitals.³ No person can rely on an estoppel growing out of a transaction to which he is not a party or privy and which in no manner touches his rights. *Mutuality* is a requisite to all estoppels.⁴ Hence the estoppel of a deed does not extend to a *collateral action*, where the cause of action is different, although the subject matter may be the same;⁵ and it is applied only in some proceeding based on the deed in question.⁶ Although the estoppel does not extend to *strangers to the transaction*, those who act under the authority of the grantee are so connected in interest that they may take advantage of an estoppel.⁷ But there is no such privity between *creditor and debtor*. The legal relation between them is one of antagonism, rather than of confidence and dependence.⁸ On the same principle there is not such privity between the *grantor and the grantee* that the latter is in all cases estopped from setting up a paramount title which he has acquired from another person. Although a grantee can not dispute his grantor's title at the time of conveyance for the purpose of avoiding payment of the purchase price, and although when two parties assert title from a common grantor and no other source, neither can deny that such grantor had a valid title, yet one of such parties may secure *title from another source* and is not estopped to rely on

it." "A vendee has the right to *fortify his title* by the purchase of any other which may protect him in the quiet enjoyment of his premises." ¹⁰

1, *Irvine v. Irvine*, 9 Wall. 625; *Cole v. Raymond*, 9 Gray 217; *Knight v. Thayer*, 125 Mass. 25; *O'Bannon v. Parmour*, 24 Ga. 493; *Jarvis v. Aikens*, 25 Vt. 635; *Jackson v. Hubble*, 1 Cow. 613; *Gochenour v. Mowry*, 33 Ill. 331; *Reese v. Smith*, 12 Mo. 344; *Jackson v. Wright*, 14 Johns. 193; *Kimball v. Schoff*, 40 N. H. 190; *Crocker v. Pierce*, 31 Me. 177; *Broadwell v. Phillips*, 30 Ohio St. 255; *Wiesner v. Zaun*, 39 Wis. 188; *House v. McCormick*, 57 N. Y. 310; *Burtners v. Keran*, 24 Gratt. (Va.) 42; *McCusker v. McEvey*, 9 R. I. 528; 11 Am. Rep. 295; *Doe v. Dowdall*, 3 Houst. (Del.) 369; 11 Am. Rep. 757. See notes, 37 Am. Dec. 129; 23 Am. Dec. 673.

2, See cases last cited. But this is not so if the instrument is a mere release or quit-claim deed, *Bell v. Twilight*, 26 N. H. 401; *Jackson v. Wright*, 14 Johns. 193; *Clark v. Baker*, 14 Cal. 612; 76 Am. Dec. 449; *Pelletreau v. Jackson*, 11 Wend. 116; *Kinsman v. Loomis*, 11 Ohio 475; *Pike v. Galvin*, 29 Me. 183; *Harriman v. Gray*, 49 Me. 537; *Dorris v. Smith*, 7 Ore. 207; *Graham v. Graham*, 55 Ind. 23; *McAllister v. Devane*, 76 N. C. 57. See note, 37 Am. Dec. 130.

3, *Doe v. Errington*, 8 Scott 210; *Waters Appeal*, 35 Pa. St. 523; 78 Am. Dec. 354; *Allen v. Allen*, 45 Pa. St. 468; *Sunderlin v. Struthers*, 47 Pa. St. 411; *Carver v. Jackson*, 4 Peters 1; *Penrose v. Griffith*, 4 Binn. (Pa.) 231; *Glidden v. Unity*, 30 N. H. 104; *Buffum v. Hutchinson*, 1 Allen 58.

4, *Deery v. Cray*, 5 Wall. 795.

5, *Merrifield v. Parritt*, 11 Cush. 590; *Carpenter v. Buller*, 8 M. & W. 209; *Edmonston v. Edmonston*, 13 Hun (N. Y.) 133.

6, *Carpenter v. Buller*, 8 M. & W. 209; *McFarland v. Goodman*, 6 Biss. (U. S.) 111. Nor can a deed create an estoppel, unless it has been delivered, *Nourse v. Nourse*, 116 Mass. 104.

7, *Osgood v. Abbott*, 58 Me. 73.

8, *Waters Appeal*, 35 Pa. St. 523; 78 Am. Dec. 354.

9, *Robertson v. Pickrell*, 109 U. S. 608; *Osterhout Shoemaker*, 3 Hill 513.

10, *Osterhout v. Shoemaker*, 3 Hill 513.

§ 285. **Qualifications as to mere general recitals — Other qualifications of the general rule.** — The decisions recognize a distinction between those recitals in a deed which are specific or particular and which must be deemed to have received the deliberate intention of the parties, and those which are general and merely formal. The rule is elsewhere stated that recitals as to consideration, date, quantity and the like do not carry the same conclusive effect as the more specific recitals and statements referred to in this discussion. In order to have conclusive effect recitals should be clear and unambiguous.¹ And it has sometimes been said that to constitute an estoppel by deed, there should be a distinct and precise admission of a fact.² But *general recitals*, if *contractual* in their nature, may also constitute an estoppel. And it is to be determined from the entire agreement whether it was the intention of the parties that the recital should be conclusive in its effect.³ Nor is it essential to the estoppel in all cases that the admission should be made in terms. It is enough if the intention of the parties to place the existence of a fact beyond question or make it the basis of

the contract is so clearly expressed as to leave no room for doubt.⁴ It is another familiar limitation that, when the *truth appears on the face of the instrument*, there is no estoppel. The whole instrument is to be construed together and, if a recital in one part is contradicted or qualified by a recital in another part, there is estoppel against estoppel, which leaves the matter open to proof.⁵ Other qualifications are that the deed *must be delivered*;⁶ that it must be a valid instrument,⁷ and not in violation of statute;⁸ but if the deed has been procured by fraud, its validity is open to question.⁹ It is another qualification that "in order to work an estoppel the *parties to the deed must be sui juris*, competent to make it effectual as a contract."¹⁰ Hence at common law a *married woman* is not estopped by her covenants.¹¹ But married women are *sui juris* to the extent of the enlarged capacity to act conferred by statutes; and in those jurisdictions, where the statutes have enabled married women to make contracts as though single, there is no reason for the application of the old rule.¹² The principle that the parties must be *sui juris* applies of course to the case of *infants* who are not estopped by recitals in deeds, unless there has been ratification after reaching majority.¹³

1, School Dist. v. Stone, 106 U. S. 183. See sec. 475 *infra*.

2, Jackson v. Allen, 120 Mass. 64.

3, *Southeastern Ry. Co. v. Warton*, 6 Hurl. & N. 520; *Carpenter v. Buller*, 8 M. & W. 209; *Stroughill v. Buck*, 14 Q. B. 781; *Young v. Raincock*, 7 C. B. 310; *Bower v. McCormick*, 23 Gratt. (Va.) 310; *Blackhall v. Gibson*, 2 L. R. Ir. 49.

4, *Billingsley v. State*, 14 Md. 369.

5, *Pargeter v. Harris*, 7 Q. B. 708; *Cuthbertson v. Irving*, 4 Hurl. & N. 742; *Sinclair v. Jackson*, 8 Cow. 543, 586; *Wheelock v. Henshaw*, 19 Pick. 341; *Carpenter v. Thompson*, 3 N. H. 204.

6, *Nourse v. Nourse*, 116 Mass. 101.

7, *Caffrey v. Dudgeon*, 38 Ind. 512; 10 Am. Rep. 126; *Conant v. Newton*, 126 Mass. 105; *Pells v. Webquish*, 129 Mass. 469; *James v. Wilder*, 25 Minn. 305; *Shevlin v. Whelen*, 41 Wis. 88; *Fairtitle v. Gilbert*, 2 T. R. 169.

8, See cases last cited.

9, *Parry v. Parry*, 130 Pa. St. 94.

10, *Bank of America v. Banks*, 101 U. S. 240, 247.

11, *Bank of America v. Banks*, 101 U. S. 240; *Good-enough v. Fellows*, 53 Vt. 102; *Trentman v. Eldridge*, 98 Ind. 525; *Jackson v. Vanderheyden*, 17 Johns. 167; 8 Am. Dec. 378; *Lowell v. Daniels*, 2 Gray 161; 61 Am. Dec. 448; *Wight v. Shaw*, 5 Cush. 56; *Barker v. Circle*, 60 Mo. 258; *Wood v. Terry*, 30 Ark. 385; *Hardin v. Darwin*, 77 Ala. 472; *Patterson v. Lawrence*, 90 Ill. 174; 32 Am. Rep. 22; *McLeery v. McLeery*, 65 Me. 172; 20 Am. Rep. 683.

12, *Knight v. Thayer*, 125 Mass. 25; *Bodine v. Killeen*, 53 N. Y. 93; *Godfrey v. Thornton*, 46 Wis. 677. Married women, like other persons, may be estopped by their deliberate acts on grounds of equitable estoppel, *Norton v. Nichols*, 35 Mich. 148; *Godfrey v. Thornton*, 46 Wis. 677; *Sharpe v. Foy*, 4 Ch. App. 35; *In re Lush's Trusts*, 4 Ch. App. 591.

13, *Cooks v. Toombs*, 36 Miss. 685; *Houston v. Turk*, 7 Verg. (Tenn.) 13.

§ 286. As between landlord and tenant.—It is a familiar rule in the law of

landlord and tenant that one who as tenant has entered into the possession of land under the permission of his landlord cannot in equity and good conscience be heard to prove, while in such possession, that his landlord had no title. Said Lord Denman: "No general rule, when rightly understood, is more important or more strictly to be observed than that which precludes the tenant from disputing the title of his landlord."¹ The tenant may, however, show that the landlord's title has expired or been conveyed to another or to himself.² And he is not estopped to deny a claim for rent, when he has been ousted or evicted by *title paramount*,³ or when the *lease* was in fact *void*, and the relation of landlord and tenant never in fact existed.⁴ The tenant may also show *fraudulent representations*,⁵ *duress* practiced by the landlord⁶ or *mistake* on the part of the tenant,⁷ but the clear burden of proof is on the tenant to show such fraud or mistake.⁸ Payment of rent is evidence of possession by permission and, unless explained, establishes the relation of landlord and tenant." The estoppel arises not only against the tenant, but against all holding under him or in *privity* with him, and in favor of all persons claiming under the lessor.¹⁰ It continues *after the lease has expired*; and the tenant cannot deny his landlord's title without surrendering possession to the landlord or attorning, or at

least giving notice that he shall claim under another and better title.¹¹

1, Doe *ex dem.* Plevin v. Brown, 7 Adol. & Ell. 447. As to the general principles see, Doe v. Barton, 11 Adol. & Ell. 307; Doe v. Smith, 4 Maule & S. 347; Doe v. Pegg, 1. T. R. 760 and note; Stott v. Rutherford, 92 U. S. 107; Prevot v. Lawrence, 51 N. Y. 219; Whalin v. White, 25 N. Y. 462; Gage v. Campbell, 131 Mass. 566; Rogers v. Waller, 4 Hayw. (Tenn.) 205; 9 Am. Dec. 758; Hatch v. Bullock, 57 N. H. 15; Betts v. Wurth, 32 N. J. Eq. 82; Terrett v. Cowenhaven, 79 N. Y. 400; Nims v. Sherman, 43 Mich. 45.

2, Hopcraft v. Keys, 9 Bing. 613; Otis v. McMillan, 70 Ala. 46; Bettison v. Budd, 17 Ark. 546; 65 Am. Dec. 442; Ferguson v. Etter, 21 Ark. 160; 76 Am. Dec. 361; Pickett v. Ferguson, 45 Ark. 177; 55 Am. Rep. 545; Lawrence v. Webster, 44 Cal. 385; Rodgers v. Palmer, 33 Conn. 155; Worthy v. Tate, 44 Ga. 152; Doty v. Burdick, 83 Ill. 473; Stout v. Merrill, 35 Iowa 47; Weichselbaum v. Curlett, 20 Kan. 709; 27 Am. Rep. 204; Gregory v. Crabb, 2 B. Mon. (Ky.) 234; Ryder v. Mansell, 66 Me. 167; Chamberlain v. Perry, 138 Mass. 546; Snyder v. Hemmingway, 47 Mich. 549; Higgins v. Turner, 61 Mo. 249; Brown v. Supervisors, 54 Miss. 230; Nellis v. Lathrop, 22 Wend. 121; 34 Am. Dec. 285; Merrell v. Roberts, 11 Ired. (N. C.) 424; 53 Am. Dec. 419; Smith v. Grosland, 106 Pa. St. 413; Camley v. Stanfield, 10 Tex. 546; 60 Am. Dec. 219; Bowser v. Bowser, 10 Humph. (Tenn.) 49; Chase v. Dearborn, 21 Wis. 57.

3, Farris v. Houston, 74 Ala. 162; Tewksbury v. Magroff, 33 Cal. 237; Camp v. Scott, 47 Conn. 366; Milburn v. Whitfield, 44 Ga. 51; Doty v. Burdick, 83 Ill. 473; Stout v. Merrill, 35 Iowa 47; Foster v. Morris, 3 A. K. Marsh. (Ky.) 611; 13 Am. Dec. 205; Sneed v. Jenkins, 8 Ired. (N. C.) 27; Pendleton v. Dyett, 4 Cow. 581; Hunt v. Cope, 1 Cowp. 242.

4, Hughes v. Clarksville, 6 Peters 369; Milton v. Haden, 32 Ala. 30; 70 Am. Dec. 523; Keller v. Klopfer, 3 Col. 132; Uhlig v. Garrison, 2 Dak. 71; Tribble v. Anderson, 63 Ga. 31; Green v. Dietrick, 114 Ill. 636; Andrews v. Woodcock, 14 Iowa 397; Dyer v. Curtis, 72 Me. 180; Holmes v. Turner's Falls Co., 142 Mass. 590; Bain v. Matteson, 54 N. Y.

663; Weaver v. Sturtevant, 12 R. I. 537; Ross v. Cobb, 9 Yerg. (Tenn.) 463; Furlong v. Garrett, 44 Wis. 111. But see, Sharpe v. Kelley, 5 Den. 431; Henley v. Branch Bank, 16 Ala. 552; Norton v. Sanders, 1 Dana (Ky.) 14; Drane v. Gregory, 3 B. Mon. (Ky.) 619; Wilson v. Smith, 5 Yerg. (Tenn.) 379.

5, Miller v. McBrier, 14 Serg. & R. (Pa.) 382; Jackson v. Cuerden, 2 Johns. Cas. 353; Swift v. Dean, 11 Vt. 323; 34 Am. Dec. 693; Strauss v. Harrison, 79 Ala. 324; Peralta v. Ginochio, 47 Cal. 459; Tisson v. Yawn, 15 Ga. 491; 60 Am. Dec. 708; Carter v. Marshall, 72 Ill. 609; Higgins v. Turner, 61 Mo. 249; Givens v. Mullinax, 4 Rich. L. (S. C.) 591; 55 Am. Dec. 706; Redmond v. Bowles, 5 Sneed (Tenn.) 547; 73 Am. Dec. 153; Hammons v. McClure, 85 Tenn. 65. See note, 13 Am. Dec. 69.

6, Hamilton v. Marsdon, 6 Binn. (Pa.) 45; Brown v. Dysinger, 1 Rawle (Pa.) 408; Hall v. Benner, 1 Pen. & W. (Pa.) 402; 21 Am. Dec. 394; Gravenor v. Woodhouse, 1 Bing. 38. See note, 13 Am. Dec. 69.

7, See cases cited in note 5 *supra*.

8, Kinney v. Doe, 8 Blackf. (Ind.) 350; Howell v. Ashmore, 22 N. J. L. 261; Beatty v. Fishel, 100 Mass. 448.

9, Thomson v. Amey, 12 Adol. & Ell. 476; Brathwaite v. Hitchcock, 10 M. & W. 494; Pennington v. Tainere, 12 Q. B. 998; People v. Simpson, 50 Cal. 304; Leitch v. Boyington, 84 Ill. 179; Rothschild v. Williamson, 83 Ind. 387; Jones v. Howard, 3 Allen 223; McFarlan v. Watson, 3 N. Y. 286; Vinz v. Beatty, 61 Wis. 645; Doe v. Wilkinson, 3 Barn. & C. 413; Cooper v. Blandy, 1 Bing. N. C. 45; Dunshee v. Grundy, 15 Gray 314; Whalin v. White, 25 N. Y. 462.

10, Bishop v. Lalouette, 67 Ala. 197; Earle v. Hale, 31 Ark. 470; Standley v. Stephens, 66 Cal. 541; White v. Barlow, 72 Ga. 887; Hardin v. Jones, 86 Ill. 313; Coburn v. Palmer, 8 Cush. 124; Worthington v. Lee, 61 Md. 530; Page v. McClinch, 63 Me. 472; Woodruff v. Erie Ry. Co., 93 N. Y. 609; Luce v. Carley, 24 Wend. 451; 35 Am. Dec. 637; Jackson v. Davis, 5 Cow. 123; 15 Am. Dec. 451;

Leshey v. Gardner, 3 Watts & S. (Pa.) 314; 38 Am. Dec. 764; Bannon v. Brandon, 34 Pa. St. 63; 75 Am. Dec. 655; Doak v. Donelson, 2 Yerg. (Tenn.) 249; 24 Am. Dec. 485; Emerick v. Tavener, 9 Gratt. (Va.) 220; 58 Am. Dec. 217; Willison v. Watkins, 3 Peters. 43.

11, Miller v. Lang, 99 Mass. 13; Hilbourn v. Fogg, 99 Mass. 11; Morse v. Goddard, 13 Met. 177; 46 Am. Dec. 728; Boston v. Binney, 11 Pick. 1; 22 Am. Dec. 353; Zeller v. Eckert, 4 How. 295.

§ 287. **As between others holding subordinate title — Bailees, etc.** — The principle under discussion not only applies in the case of landlord and tenant, but generally to those holding a subordinate title. Thus, one who holds land as a *licensee* cannot question the title of him by whose consent he obtained possession;¹ one who manufactures goods by consent of and under agreement with the patentee cannot be allowed to prove the invalidity of the patent;² an *agent* who has collected a debt for his *principal* cannot prove as a defense for keeping the proceeds that the debt was not justly due;³ a *bailee* entrusted with the care of goods is estopped to claim that the bailor had no title at the time of the bailment,⁴ or to set up the title of a third person, unless the bailment is determined by what is equivalent to an eviction by title paramount.⁵ But while the bailee cannot avail himself of the title of a third person, though that third person be the true owner, for the purpose of keeping the property for himself, yet he may show as a defense against

the bailor that he *has actually delivered* the property to the true *owner*, who had the right to possession upon demand by the latter, even before legal proceedings have been commenced.⁶ Such demand by the true owner is equivalent to eviction by title paramount.⁷ Mr. Stephen thus states somewhat differently the qualification of the general rule: "Provided that any such bailee, agent or licensee may show that he was compelled to deliver up any such goods to some person who had a right to them, as against his bailor, principal or licensor, or that his bailor, principal or licensor wrongfully and without notice to the bailee, agent or licensee obtained the goods from a third person who has claimed them from such bailee, agent or licensee."⁸

1, Glynn v. George, 20 N. H. 114; Towne v. Butterfield, 97 Mass. 105; Wilson v. Maltby, 59 N. Y. 126; Dills v. Hampton, 92 N. C. 565.

2, Kinsman v. Parkhurst, 18 How. 289; Jackson v. Allen, 120 Mass. 64; Marston v. Swett, 82 N. Y. 526; Marsh v. Harris, 63 Wis. 276; Forncrook v. Barnum, 54 Mich. 552; Jones v. Burnham, 67 Me. 93; 24 Am. Rep. 10; Eureka Co. v. Bailey Co., 11 Wall. 488; Noton v. Brooks, 7 Hurl. & N. 499; Crossley v. Dixon, 10 H. L. Cas. 293.

3, Kinsman v. Parkhurst, 18 How. 289.

4, Osgood v. Nichols, 5 Gray 420.

5, Shelsbury v. Scatsford, 1 Yelv. 23; Biddle v. Pond, 34 Law J. (Q. B.) 137; Betteley v. Reed, 4 Q. B. 511; The "Idaho," 93 U. S. 575; Seneca v. Allen, 99 N. Y. 532; Pulliam v. Burlingame, 81 Mo. 111; 51 Am. Rep. 229.

6, The "Idaho," 93 U. S. 575; Western Trans. Co. v. Barber, 56 N. Y. 544.

7, See cases last cited.

8, Steph. Ev. art. 105; Dixon v. Hammopd, 2 Barn. & Ald. 313; Crossley v. Dixon, 10 H. L. Cas. 293; Gosling v. Birnie, 7 Bing. 339; Hardman v. Willcock, 9 Bing. 382; Biddle v. Bond, 34 Law J. (Q. B.) 137; Wilson v. Anderton, 1 Barn. & Adol. 450; The "Idaho," 93 U. S. 575; Western Trans. Co. v. Barber, 56 N. Y. 544; King v. Richards, 6 Whart. (Pa.) 418; 37 Am. Dec. 420.

288. Acceptance of bills of exchange. — The principle of estoppel is frequently applied in the case of the acceptance of bills of exchange. The acceptor by such act admits the genuineness of the signatures of the drawers and the competency of the drawers to assume that responsibility.' The rule is thus stated by Mr. Stephen: "No acceptor of a bill of exchange is permitted to deny the signature of the drawer, or his capacity to draw, or, if the bill is payable to the order of the drawer, his capacity to endorse the bill, though he may deny the fact of the endorsement, nor, if the bill be drawn by procuration, the authority of the agent by whom it purports to be drawn to draw in the name of the principal, though he may deny his authority to endorse it. If the bill is accepted in blank, the acceptor may not deny the fact that the drawer endorsed it."² But by accepting and paying a bill the drawee is not held to a knowledge of a *want of genuineness* of any other part of the instrument, or of any other names appearing thereon, or of the title of the holder.³

1, *Hoffman v. Bank of Milwaukee*, 12 Wall. 181.

2, *Steph. Ev. art.* 104; *Garland v. Jacomb*, L. R. 8 Exch. 216; *White v. Continental Nat. Bank*, 64 N. Y. 316; 21 Am. Rep. 612; *Hoffman v. Bank of Milwaukee*, 12 Wall. 181; *National Bank v. Bangs*, 106 Mass. 441; 8 Am. Rep. 349; *Sanderson v. Collman*, 4 Man. & G. 209; *Robinson v. Yarrow*, 7 Taunt. 455; *London & S. W. Bank v. Wentworth*, 5 Exch. Div. 96.

3, *Espy v. Bank of Cincinnati*, 18 Wall. 604; *Hoffman v. Bank of Milwaukee*, 12 Wall. 181, 192. See also, *Ellis v. Ohio Life Ins. Co.*, 4 Ohio St. 628.

§ 289. **Form of admissions — Conduct.**— We have already seen that admissions are not limited to any particular form. They may not only be in the form of declarations, verbal or written, but may be implied from the *conduct* or acts of parties as well as from their language. Thus, the payment of interest or a part of a debt is an admission of the debt.¹ So the payment of money is an admission that the one receiving it is the proper payee.² As already stated the *suppression of evidence* is an admission that the evidence suppressed would be unfavorable;³ and the attempt by a party to suborn witnesses is an admission that his cause is an unrighteous one.⁴ Where a *landlord* stands by without objection and sees a *tenant* make alterations beyond his right, it is an admission that the landlord means to be bound by the tenant's acts;⁵ and if a landlord makes repairs, it is an admission that it is his duty and not that of the tenant.⁶ When an *account is rendered*

and no objection is made within a reasonable time, this is an admission *prima facie* by the party charged that the account is correct;⁷ but of course the presumption of assent may be rebutted.⁸ *Assuming to act as an officer* is an admission by the person so acting that he is such officer, and that he is subject to the liabilities incident to the office.⁹ "So where one has recognized the official character of another by treating with him in such character or otherwise, this is at least *prima facie* evidence of his title against the party thus recognizing it."¹⁰ Where a party omits to assert a claim to a sum of money when all his demands are submitted to an arbitrator, such conduct is construed as an admission against him when he subsequently asserts a claim to the same money.¹¹

1, Washer v. White, 16 Ind. 136. In general, see sec. 277 *supra*.

2, James v. Biou, 2 Sim. & St. 606; Chapman v. Beard, 3 Anstr. 942.

3, See secs. 16 *et seq. supra*.

4, Moriarty v. London Ry. Co., 39 L. J. (Q. B.) 109; L. R. 5 Q. B. 314.

5, Doe v. Pye, 1 Esp. 364.

6, Readman v. Conway, 126 Mass. 374.

7, Willis v. Jernegan, 2 Atk. 252; Murry v. Toland, 3 Johns. Ch. (N. Y.) 569; Wiggins v. Burkham, 10 Wall. 129; Guernsey v. Rexford, 63 N. Y. 631.

8, Guernsey v. Rexford, 63 N. Y. 631.

9, Trowbridge v. Baker, 1 Cow. 251, action against a toll-gatherer; Rex v. Borrett, 6 Car. & P. 124, criminal action

against a letter carrier; *Lister v. Priestley*, Wightw. 67, action against a collector of taxes.

10, 1 Greenl. Ev. sec. 195, and cases cited; *Peacock v. Harris*, 10 East 104; *Radford v. McIntosh*, 3 T. R. 632; *Pritchard v. Walker*, 3 Car. & P. 212; *Dickinson v. Coward*, 1 Barn. & Ald. 677.

11, *Moore v. Dunn*, 42 N. H. 471.

§ 290. Same — Repairing defective machinery or highways.— In actions based on negligence the attempt is often made to draw an inference of prior negligence from the fact that, since the act complained of, the defendant has repaired the alleged defect or adopted some new precaution. While some of the authorities hold that this may be done;¹ yet the decided weight of authority holds such evidence incompetent. In some instances evidence of this character has been rejected on the ground that persons making the change were not shown to have authority to make admissions for or to charge the defendant by such acts.² But evidence of this character is clearly open to a much more serious objection, as was well stated in a Minnesota case: "Such acts afford no legitimate basis for construing such an act as an admission of previous neglect of duty. A person may have exercised all the care which the law required and yet, in the light of his new experience, after an unexpected accident has occurred, and as a measure of extreme caution, he may adopt additional safeguards.

The more careful a person is, the more regard he has for the lives of others, the more likely he would be to do so, and it would seem unjust that he could not do so without being liable to have such acts construed as an admission of prior negligence. We think such a rule puts an unfair interpretation upon human conduct and virtually holds out an inducement for continued negligence."³ In the court of exchequer Baron Bramwell thus expressed the same view: "People do not furnish evidence against themselves simply by adopting a new plan in order to prevent the recurrence of an accident. I think that a proposition to the contrary would be barbarous. It would be, as I have often had occasion to tell juries, to hold that, because the world gets wiser as it gets older, therefore it was foolish before."⁴ But evidence of this character may be competent for the purpose of showing that the place of the accident was *under the control of the defendant*, if this becomes an issue,⁵ or that the place or machinery complained of is *not at the time of the trial in the same condition as at the time of the accident*.⁶

1, *Pennsylvania Ry. Co. v. Henderson*, 51 Pa. St. 315; *Westchester Ry. Co. v. McElwee*, 67 Pa. St. 311; *McKee v. Bidwell*, 74 Pa. St. 218; *St. Louis & S. F. Ry. Co. v. Weaver*, 35 Kan. 412; 57 Am. Rep. 176. On the general subject of this section see notes, 57 Am. Rep. 183-187; 18 Am. St. Rep. 307-310. See also secs. 161 *et seq. supra*.

2, *Terre Haute Ry. Co. v. Clem*, 123 Ind. 15; 18 Am. St.

Rep. 303; *Hodges v. Percival*, 132 Ill. 53; *Dougan v. Champlain Co.*, 56 N. Y. 1; *Baird v. Daly*, 57 N. Y. 236; 15 Am. Rep. 488; *Dale v. Delaware, L. & W. Ry. Co.*, 73 N. Y. 468; *Cramer v. Burlington*, 45 Iowa 627; *Hudson v. Chicago Ry. Co.*, 59 Iowa 581; 44 Am. Rep. 692; *Ely v. St. Louis Ry. Co.*, 77 Mo. 34; *Jennings v. Town of Albion*, 90 Wis. 22.

3, *Morse v. Minneapolis Co.*, 30 Minn. 465; *Getty v. Town of Hamlin*, 127 N. Y. 636; *Clapper v. Waterford*, 131 N. Y. 382; *Woodbury v. Owosso*, 64 Mich. 239; *Gulf Ry. Co. v. McGowan*, 73 Tex. 355; *Missouri Pac. Ry. Co. v. Hennessey*, 75 Tex. 155; *Terre Haute Ry. Co. v. Clem*, 123 Ind. 15; 18 Am. St. Rep. 303 and note; *Colorado Elec. Co. v. Lubbers*, 11 Col. 505; 7 Am. St. Rep. 255; *Lang v. Sanger*, 76 Wis. 71; *Nalley v. Hartford Carpet Co.*, 51 Conn. 524; 50 Am. Rep. 47. See also cases last cited and extended note, 18 Am. St. Rep. 307-310.

4, *Hart v. Lancashire & Yorkshire Ry.*, 21 L. T. (N. S.) 261, 263.

5, *Lafayette v. Weaver*, 92 Ind. 477.

6, *Hirsh v. Buffalo*, 107 N. Y. 671; 36 Hun 638; *Chicago v. Dalle*, 115 Ill. 386; *Nesbit v. Garner*, 75 Iowa 314; 9 Am. St. Rep. 486; *Clancy v. Byrne*, 56 N. Y. 129; 15 Am. Rep. 391; *Mackie v. Central Ry. Co.*, 54 Iowa 405.

§ 291. Admissions may be implied from silence.—It is well settled, as some of the cases already cited illustrate, that admissions may sometimes be implied from the mere silence of a party. Thus, the declarations made by one party to the other relative to the subject matter in controversy, and not denied by him, are admissible as evidence for the former.¹ Such evidence cannot be rebutted by proof of different declarations subsequently made by the same person. The same rule applies where a *party omits to reply*

to statements in a letter about which he has knowledge, and which, if not true, he would naturally deny when he replies to other parts of the letter.² It applies also to *declarations of a third person addressed to a party* and not denied.³ Although it is constant practice to receive evidence of this character, following the familiar maxim *qui tacet consentire videtur*, there are important limitations which should be observed. The testimony is received on the theory that the failure to deny what is asserted in the presence of a party is an *implied admission* of the truth of the statement.⁴ But there is no ground for presuming acquiescence in such statements, unless they are of such a character as would naturally *call for a response*, and unless the party sought to be charged was in such a situation that he would probably have replied to them.⁵ Generally the cases in which the party is held to be affected by his silence will be found to be cases where statements were made of his own actions or his own liabilities, and not where he had no concern in law and no right to reply.⁶ Such testimony should be *received and applied with caution*, especially when the statements are made, not by a party to the controversy, but by a stranger.⁷ When there is no natural or reasonable inference from the silence of a party that he acquiesced in the truth of the statements, they should be excluded.⁸ There is hardly any ground to

infer acquiescence in such cases, unless it appears that the truth or falsehood of the statements made must have been *within the knowledge* of the party sought to be charged;⁹ and if by reason of deafness, intoxication or other cause the statements were not understood by him, they of course should not be received.¹⁰ If, however, it is uncertain whether the party heard or understood the statements, this is a question for the jury to determine.¹¹

1, Block v. Hicks, 27 Ga. 522; Hagenbaugh v. Crabtree, 33 Ill. 225; Proctor v. Old Colony Ry. Co., 154 Mass. 251; Corser v. Paul, 41 N. H. 24; 77 Am. Dec. 753; McClenkin v. McMillan, 6 Pa. St. 366; Wells v. Drayton, 1 Mill's Const. (S. C.) 111; Des Moines Bank v. Hotel Co., 88 Iowa 4; Evans v. Montgomery, 95 Mich. 497; Com. v. Kenney, 12 Met. 235; 46 Am. Dec. 672, 675 and note.

2, Flenno v. Weston, 31 Vt. 345.

3, Boston & W. Ry. Co. v. Dana, 1 Gray 83.

4, Batturs v. Sellers, 5 Harr. & J. (Md.) 117; 9 Am. Dec. 492.

5, Lawson v. State, 20 Ala. 65; 56 Am. Dec. 182; Giles v. Vandiver, 91 Ga. 192; Wilkins v. Stidger, 22 Cal. 231; 83 Am. Dec. 64; Barry v. Davis, 33 Mich. 515; Rolfe v. Rolfe, 10 Ga. 143; Pierce's Adm. v. Pierce, 66 Vt. 369; Abercrombie v. Allen, 29 Ala. 281; Brainard v. Buck, 25 Vt. 573; 60 Am. Dec. 291; Churchill v. Fulliam, 8 Iowa 45; Bright v. Coffman, 15 Ind. 371; 77 Am. Dec. 96; Gibney v. Marchay, 34 N. Y. 301; Moore v. Smith, 14 Serg. & R. (Pa.) 388; Slattery v. People, 76 Ill. 217; Whitney v. Houghton, 127 Mass. 527. This is true as to statements made by a minister in a sermon, which are received in silence, Johnson v. Trinity Church, 11 Allen 123.

6, Gibney v. Marchay, 34 N. Y. 301.

7, *Larry v. Sherburne*, 2 Allen 34; *Whitney v. Houghton*, 127 Mass. 527.

8, *Whitney v. Houghton*, 127 Mass. 527.

9, *Hayslep v. Gymer*, 1 Adol. & Ell. 162; *Edwards v. Williams*, 3 Miss. 846; *Com. v. Kenney*, 12 Met. 235; 46 Am. Dec. 672.

10, *Tufts v. Charlestown*, 4 Gray 537, deafness; *State v. Perkins*, 3 Hawks (N. C.) 377, intoxication; *Lanergan v. People*, 39 N. Y. 39, where the person sought to be charged was asleep; *Wright v. Maseras*, 56 Barb. (N. Y.) 521, where he was foreigner.

11, *Com. v. Sliney*, 126 Mass. 49.

§ 292. **Same — No admission from silence at judicial proceedings.**—The rule allowing the silence of a person to be taken as an implied admission of truth of allegations uttered in his presence applies in criminal, as well as civil, cases,¹ but it does not apply to silence at a *judicial proceeding* or hearing.² Thus, it is error to admit evidence that a party to a suit was silent where his adversary testified to certain facts on a former trial which were prejudicial to him. There can be no inference of acquiescence in such case, as the party is not at liberty to contradict the statement of a witness while testifying.³ He could not interfere and deny the statement. To do this would be to charge the witness with perjury which would be alike inconsistent with decorum and with the rules of law.⁴ Although no admission is to be implied from silence, unless the circumstances are such as to call for some reply, yet if the party makes any

reply or declaration in regard to his own rights, the whole conversation is admissible under proper instructions.⁵

1, Kelley v. People, 55 N. Y. 565; Com. v. Galavan, 9 Allen 271; Ettinger v. Com., 98 Pa. St. 338; State v. Reed, 62 Me. 129; Jewett v. Banning, 21 N. Y. 27.

2, People v. Willett, 92 N. Y. 29; Johnson v. Holliday, 79 Ind. 151. But see, Blanchard v. Hodgins, 62 Me. 119.

3, Broyler v. State, 47 Ind. 251.

4, Com. v. Kenney, 12 Met. 235; 46 Am. Dec. 672; Com. v. Walker, 13 Allen 570; Bob v. State, 32 Ala. 560; Noonan v. State, 9 Miss. 562.

5, Mattocks v. Lyman, 16 Vt. 113; Pierce's Adm. v. Pierce, 66 Vt. 369.

§ 293. **Offers of compromise.**—Overtures for the compromise of controversies are frequently made by parties who in good faith believe in the justice of their claim or defence, but who desire to avoid the annoyance and uncertainty of litigation. Hence offers of compromise are not necessarily any admission that the claim or defence is lacking in merit; and such offers are not in general admissible.¹ The rule is very clear that, when such offers are expressly stated to be *without prejudice*, they are inadmissible.² If the contrary rule prevailed no attempt to amicably settle litigation could safely be made; and the courts are inclined to encourage rather than discourage such adjustments. Accordingly offers by a party with a view to compromise, to pay or

accept a sum of money,³ or to make deductions,⁴ or to submit to arbitration,⁵ or to surrender certain property,⁶ or to purchase the property in dispute,⁷ and in general any efforts to secure a settlement⁸ are inadmissible. While there are cases holding that an offer of compromise is admissible, unless it is stated to be without prejudice,⁹ yet the prevailing rule in England and in this country is that the offer will be *presumed to have been made without prejudice*, if it was plainly an offer of compromise.¹⁰ The courts look at the intrinsic character of the transaction; and if the offer is clearly one of compromise, it is inferred to have been made without prejudice. In such case no caution that the offer is confidential or without prejudice need be expressed.¹¹ But the rule under consideration *does not exclude the admission of independent facts*, although such admissions are made during the treaty for a compromise.¹² Thus, admissions of fact made during negotiations of settlement have been received to prove guilt in actions for bastardy¹³ and criminal conversation;¹⁴ to prove non-performance of contract,¹⁵ agency,¹⁶ repetition of a slander,¹⁷ facts admitted by the superintendent tending to show liability of a railroad company,¹⁸ execution of a note,¹⁹ the correctness of an account²⁰ and the genuineness of handwriting.²¹ Although it will be seen that the courts have frequently held it proper to receive admis-

sions of distinct facts during such negotiation, yet if the admission is of such a nature that the court can see that it would not have been made except for the purpose of the negotiations, and that under an agreement, fairly to be implied from the circumstances, it was not to be used to the prejudice of the party making it, it is not error to exclude the evidence.²² The general rule excluding offers of compromise applies with the same force to *letters* as to verbal communications. Said Sir John Romilly: "Such communications made with a view to an amicable arrangement ought to be held very sacred, for if parties were to be afterwards prejudiced by their efforts to compromise it would be impossible to attempt any amicable arrangement of differences."²³ And where a letter comes within the rules already stated both the letter and *reply* are inadmissible.²⁴

1, See cases cited below in this section.

2, Paddock v. Forrester, 3 Man. & G. 918; Townsend v. Merchants Ins. Co., 4 Jones & Sp. (N. Y.) 172; Cory v. Bretton, 4 Car. & P. 462; Healey v. Thatcher, 8 Car. & P. 388; Wilson v. Hines, Minor (Ala.) 255; Rideout v. Newton, 17 N. H. 71; Wood v. Wood, 3 Ala. 756; Perkins v. Concord Ry. Co., 44 N. H. 223; Williams v. Thorp, 8 Cow. 201; State Bank v. Dutton, 11 Wis. 371; Draper v. Hatfield, 124 Mass. 53; Chicago Ry. Co. v. Bishop of Chicago, 119 Ill. 525; West v. Smith, 101 U. S. 263, 273.

3, Home Ins. Co. v. Baltimore W. Co., 93 U. S. 527, 548; Draper v. Hatfield, 124 Mass. 53; Manistee Bank v. Seymour, 64 Mich. 59; Louisville Co. v. Wright, 115 Ind. 378; Olson v. Peterson, 33 Neb. 358; Smith v. Whittier, 95

Cal. 279; State Bank v. Dutton, 11 Wis. 371; Barker v. Bushnell, 75 Ill. 222.

4, West v. Smith, 101 U. S. 263.

5, Mundhenk v. Central Iowa Ry. Co., 57 Iowa 718.

6, West v. Smith, 101 U. S. 263; Williams v. Price, 5 Munf. (Va.) 507.

7, Smith v. Morrow, 5 Litt. (Ky.) 217.

8, West v. Smith, 101 U. S. 263; Slocum v. Perkins, 3 Serg. & R. (Pa.) 295; Baird v. Rice, 1 Call (Va.) 18; 1 Am. Dec. 497; Strong v. Stewart, 9 Hiesk. (Tenn.) 137; Daniels v. Woonsocket, 11 R. I. 4; Tennant v. Dudley, 144 N. Y. 504; Ward v. Munson, (Mich.) 63 N. W. Rep. 498; Pelton v. Schmidt, (Mich.) 62 N. W. Rep. 552; Fowles v. Allen, 64 Conn. 350.

9, Wallace v. Small, 1 Moody & M. 446; Watts v. Lawson, 1 Moody & M. 447 in note; Dickinson v. Dickinson, 9 Met. 471; Thompson v. Austin, 2 Dowl. & Ry. 358; Hartford Co. v. Granger, 4 Conn. 148; Gerrish v. Sweetzer, 4 Pick. 374; Murray v. Coster, 4 Cow. 635.

10, West v. Smith, 101 U. S. 263; Home Ins. Co. v. Baltimore Warehouse Co., 93 U. S. 527, 548; Richards v. Noyes, 44 Wis. 609; Cory v. Bretton, 4 Car. & P. 462; Healey v. Thatcher, 8 Car. & P. 388; Paddock v. Forrester, 3 Scott N. R. 734; 3 Man. & G. 903; Jardine v. Sheridan, 2 Car. & K. 24; Whiffen v. Hardwright, 11 Beav. 111; Houghton v. Houghton, 15 Beav. 278; Jones v. Foxall, 15 Beav. 388.

11, Reynolds v. Manning, 15 Md. 510; Richards v. Noyes, 44 Wis. 609; Campau v. Dubois, 39 Mich. 274; Webber v. Dunn, 71 Me. 331; Draper v. Hatfield, 124 Mass. 53; West v. Smith, 101 U. S. 263; Gerrish v. Sweetzer, 4 Pick. 374.

12, Durgin v. Somers, 117 Mass. 55; Robb v. Hewitt, 39 Neb. 217; Taylor v. Bay City St. Ry. Co., 101 Mich. 140; Fuller v. Hampton, 5 Conn. 416; Marvin v. Richmond, 3 Den. 58; Plummer v. Currier, 52 N. H. 287; Cole v. Cole, 33 Me. 542; Doon v. Ravey, 49 Vt. 293; Ashlock v. Linder, 50 Ill. 169; Garner v. Myrick, 30 Miss. 448; Arthur v. James, 28 Pa. St. 236.

- 13, *Fuller v. Hampton*, 5 Conn. 416.
- 14, *Sanborn v. Neilson*, 4 N. H. 501.
- 15, *Hartford Co. v. Granger*, 4 Conn. 142.
- 16, *Church v. Steele*, 1 A. K. Marsh. (Ky.) 328.
- 17, *Evans v. Smith*, 5 T. B. Mon. (Ky.) 363; 17 Am. Dec. 74.
- 18, *Central Branch U. P. Ry. Co. v. Butman*, 22 Kan. 639.
- 19, *Grubbs v. Nye*, 21 Miss. 443.
- 20, *Hyde v. Stone*, 7 Wend. 354; 22 Am. Dec. 582.
- 21, *Waldbridge v. Kennison*, 1 Esp. 143.
- 22, *White v. Old Dominion Co.*, 102 N. Y. 660.
- 23, *Hoghton v. Hoghton*, 15 Beav. 278.
- 24, *Paddock v. Forrester*, 3 Man. & G. 903, 919; *Jones v. Foxall*, 15 Beav. 388.

§ 294. Effect of paying money into court.—The question has frequently arisen as to the effect of the payment of money into court by a defendant upon an order or rule for that purpose. It was the old practice, if the plaintiff refused to accept the amount paid into court, to have the amount so paid struck out of the declaration or complaint and paid out of court to the plaintiff or to his attorney. On the trial the plaintiff was not allowed to give any testimony for such amount; and if he did not recover more than the amount so paid, judgment went against him for the costs.¹ Under this old practice of paying the money into court, on a declaration setting out a special contract, the defendant

thereby admitted the contract as alleged, and a breach thereof with damages to the amount paid in.² But where the action was in assumpsit containing the common counts, the defendant only admitted by such payment some liability on some contract under the money counts; and if the plaintiff sought to recover any further sum, he was bound to prove a contract or liability on the part of the defendant as well as a larger sum due.³ In an action against a town for personal injuries caused by a defective highway, it was held that, after a payment into court of a sum of money, the defendant town had so far admitted the cause of action that it could not give evidence of contributory neglect on the part of the plaintiff.⁴ Mr. Greenleaf further states the effect of the payment of money into court as an admission: "The defendant conclusively admits that he owes the amount thus tendered in payment; that it is due for the cause mentioned in the declaration; that the plaintiff is entitled to claim it in the character in which he sues; that the court has jurisdiction of the matter; that the contract described is rightly set forth, and was duly executed; that it has been broken in the manner and to the extent declared; and, if it was a case of goods sold by sample, that they agreed with the sample. In other words, the payment of money into court admits conclusively every fact which the plaintiff would be

obliged to prove in order to recover that money. But it admits nothing beyond that. If, therefore, the contract is illegal or invalid, the payment of money into court gives it no validity; and if the payment is general, and there are several counts or contracts, some of which are legal and others not, the court will apply it to the former."⁵ So where a tender is made and the money is paid into court, though the tender is insufficient, it is a conclusive admission that the amount so paid in is due the plaintiff, and hence that the money belongs absolutely to him whatever may be the fate of the action.⁶ But in England statutes now exist allowing the defendant to plead payment into court, and at the same time to deny the plaintiff's cause of action, and to set up a special defense;⁷ and in the United States, by statutes in the various states, the defendant is allowed to make an offer of judgment, which offer, if not accepted, cannot be made use of by the plaintiff for any purpose.⁸

1, 1 Tidd's Proc. (2d Am. ed.) 569; *Bank of Columbia v. Southerland*, 3 Cow. 336.

2, *Hubbard v. Knous*, 7 Cush. 556; *Johnston v. Columbian Ins. Co.*, 7 Johns. 315.

3, *Hubbard v. Knous*, 7 Cush. 556.

4, *Bacon v. Charlton*, 7 Cush. 581.

5, 1 Greenl. Ev. sec. 205.

6, *Schnur v. Hickcox*, 45 Wis. 200; *Becker v. Boon*, 61 N. Y. 317; *Slack v. Brown*, 13 Wend. 390; *Simpson v. Curson*, 11 Ore. 361.

7, Tayl. Ev. sec. 832; *Berdon v. Greenwood*, 3 Exch. Div. 251.

8, See the statutes in the several states.

§ 295. The whole statement or admission to be received.—It is the well settled rule that the whole of a declaration or statement containing an admission should be received together. "Every admission is to be taken as an entirety of the fact which makes for the one side with the qualifications which limit, modify or destroy its effect on the other side."¹ This rule, together with its reason, is thus stated by Mr. Best: "Where part of a document or statement is used as self-harming evidence against a party, he has a right to have the whole of it laid before the jury who may then consider and attach what weight they see fit to any self-serving statements it contains."² Many illustrations of this rule might be given. Thus the whole statement must be given, where admissions of a purchase of property are coupled with the statement that the price has been paid;³ where there is an admission of trespass or other act accompanied by facts showing justification,⁴ or where an admission of sale or other contract is coupled with a statement of warranty, together with its breach, or of other qualifying terms.⁵ In a New York case the same principle was applied after an elaborate discussion where it was proved as an admission of the defendant that he had pointed out

certain property as that of the plaintiff. It was held that the defendant was entitled to prove his statement in the same conversation that the debt, for which the levy was made, was one which should be paid by the plaintiff.⁶ "Where, taking the confession together, the branch making against the party is completely avoided, qualified or explained away by another branch, and there is nothing beside, either intrinsic or extrinsic the latter branch to render it questionable, the first is neutralized; and the whole is considered by the cases as not weighing a feather against the party."⁷ But a court or jury are *not bound to give equal credit to all parts* of a statement or admission; they may believe a part and disregard the rest. The rule only requires that what is in favor of the party making the admissions should be fairly and liberally considered and weighed with the other evidence.⁸ Of course the one offering admissions of this character is not bound by the statements which are favorable to the declarant. He may rebut such statements or show them to be erroneous;⁹ and it is for the court or jury to reject such portions of the statement, if any, as appear to be inconsistent, improbable or rebutted by other circumstances in evidence.¹⁰ Although it is a familiar principle that when a part of a conversation or admission is introduced, the other party may prove the rest of such statement,

yet the rule is limited to such statements as would in any way qualify or explain the part first given. Where a conversation about a given matter is introduced, the door is not thereby opened for the introduction of what was said in relation to a different matter, although in the same conversation.¹¹ The rule is also limited to such statements as were made at the same time.¹² It is very clear that one who has made admissions cannot be permitted to give evidence of his subsequent declarations for the purpose of contradicting or explaining his former admissions.¹³

1, Justice Field in *Insurance Co. v. Newton*, 22 Wall. 35; *Queen's Case*, 2 Brod. & Bing. 298; *Grattan v. Metropolitan L. Ins. Co.*, 92 N. Y. 274; 44 Am. Rep. 372; *Moore v. Wright*, 90 Ill. 470; *Farley v. Rodocanachi*, 100 Mass. 427; *Dole v. Wooldredge*, 142 Mass. 161; *Roberts v. Roberts*, 85 N. C. 9. Further as to the general subject, see secs. 169 *supra*, 822, 856 *infra*.

2, Best Ev. sec. 520; *Randle v. Blackburn* 5 Taunt. 245; *Thompson v. Austen*, 2 Dowl. & R. 358; *Smith v. Blandy, Ryan & M.* 257; *Darby v. Ouseley*, 2 Jur. N. S. 497.

3, *Smith v. Jones*, 15 Johns. 229; *Benedict v. Nichols*, 1 Root (Conn.) 434.

4, *Credit v. Brown*, 10 Johns. 365.

5, *Kelsey v. Bush*, 2 Hill 441; *Whitwell v. Wyer*, 11 Mass. 6; *Oliver v. Gray*, 1 Har. & G. (Md.) 204; *Hopkins v. Smith*, 11 Johns. 161.

6, *Rouse v. Whited*, 25 N. Y. 170; 82 Am. Dec. 337, and extended note.

7, Phill. Ev. (Cow. & Hill's Notes), p. 343; *Smith v. Jones*, 15 Johns. 229; *Wailing v. Toll*, 9 Johns. 141; *Car-*

ver v. Tracey, 3 Johns. 427; Benedict v. Nichols, 1 Root (Conn.) 434.

8, Field v. Hitchcock, 17 Pick. 182; 28 Am. Dec. 288; Coon v. State, 21 Miss. 246; McCann v. State, 21 Miss. 471; Licett v. State, 23 Ga. 57; Green v. State, 13 Mo. 382; Mattocks v. Lyman, 18 Vt. 98; 46 Am. Dec. 138; Wilson v. Calvert, 8 Ala. 572; Brown's Case, 9 Leigh (Va.) 633; Newman v. Bradley, 1 Dall. (Pa.) 240.

9, Quick v. Johnson, 6 Mart. (La.) 532; Walden v. Sherburne, 15 Johns. 409.

10, Adkins v. Hershy, 14 Ark. 442; Ayers v. Metcalfe, 39 Ill. 307; Roberts v. Gee, 15 Barb. 449; Beckwith v. Mollohan, 2 W. Va. 477; Kelsey v. Bush, 2 Hill 441; Pearson v. Sabin, 10 N. H. 205; Mott v. Consumers' Ice Co., 73 N. Y. 543.

11, Prince v. Samo, 7 Adol. & Ell. 627; Platner v. Platner, 78 N. Y. 90; Downs v. Cent. Ry. Co., 47 N. Y. 83; Rouse v. Whited, 25 N. Y. 170; 82 Am. Dec. 337; Miller v. Wildcat Co., 52 Ind. 51. See extended note, 82 Am. Dec. 342.

12, Edwards v. Ford, 2 Bailey (S. C.) 461; Hatch v. Potter, 3 Ill. 725; 43 Am. Dec. 88; People v. Green, 1 Park. Cr. Rep. (N. Y.) 11.

13, Murray v. Coster, 4 Cow. 630; Martin v. Root, 17 Mass. 227.

§ 296. Same — Written admissions.— It is also well settled that the introduction of a part of a writing as an admission renders admissible so much of the remainder as tends to explain or qualify what has been received.¹ Thus, if part of a letter is offered as evidence, other explanatory parts may be offered;² if a party is sought to be charged or affected by a letter received in evidence, his reply thereto is admissible;³ and where one party uses as evidence a number of a series of the letters written

by the other party, the latter may introduce the entire series.⁴ On this principle it has been frequently held that where one party offers the *books* or a statement of account furnished by the other party, for the purpose of showing admissions, he renders admissible those items which are favorable as well as those which are adverse to such other party. The one offering such an account as an admission cannot have the benefit of the credits without also submitting to the debits;⁵ but it does not follow that entries in another part of the same book which have no connection with those offered must be received.⁶ By the same rule where a *pleading*, or affidavit, or deposition is offered in evidence, the statements relied on as admissions and the qualifying statements must be construed together.⁷ Although a party may offer a part of his pleading as explanatory of another part offered by the adversary, he cannot use such pleading as affirmative evidence for himself.⁸ As we have seen with respect to oral admissions, the party offering written admissions is *not bound by the accompanying statements* which qualify such admissions, if he chooses to rebut or impeach them. In other words he is not estopped to disprove them.⁹

1, *Grattan v. Metropolitan Life Ins. Co.*, 92 N. Y. 274; 44 Am. Rep. 372. See secs. 704, 822 *infra*.

2, *Walker v. Griggs*, 28 Ga. 552.

3, *Roe v. Day*, 7 Car. & P. 705; *Gibson v. Lacy*, 87 Ind.

202; *Lester v. Sutton*, 7 Mich. 329; *Livermore v. St. John*, 4 Rob. (N. Y.) 12.

4, *Zimmerman v. Huber*, 29 Ala. 379; *Raymond v. Howland*, 17 Wend. 389.

5, *Fitzpatrick v. Harris*, 8 Ala. 32; *Jones v. Jones*, 4 Hen. & M. (Va.) 447; *Waggoner v. Gray*, 2 Hen. & M. (Va.) 603; *Veiths v. Hagge*, 8 Iowa 163; *Piper v. White*, 56 Pa. St. 90. See secs. 704, 822, *infra*.

6, *Catt v. Howard*, 3 Stark. 3.

7, *Gildersleeve v. Landon*, 73 N. Y. 609; *Mott v. Consumers' Ice Co.*, 73 N. Y. 543; *Bumpass v. Webb*, 1 Stew. (Ala.) 19; 18 Am. Dec. 34; *Daviss v. Flewellin*, 29 Ga. 49; *Gildersleeve v. Maloney*, 5 Duer (N. Y.) 383; *Goodyear v. De la Vergne*, 19 Hun 537.

8, *Gunn v. Todd*, 21 Mo. 303.

9, *Mott v. Consumers' Ice Co.*, 73 N. Y. 543; *Gildersleeve v. Landon*, 73 N. Y. 609; *Walden v. Sherburne*, 15 Johns. 409.

§ 297. Weight of admissions.—It is a familiar rule that verbal admissions should be received with caution and subjected to careful scrutiny, as no class of evidence is more subject to error or abuse. Witnesses having the best motives are generally unable to state the exact language of an admission, and are liable, by the omission or the changing of words, to convey a false impression of the language used. No other class of testimony affords such temptations or opportunities for unscrupulous witnesses to torture the facts or commit open perjury, as it is often impossible to contradict their testimony at all, or at least by any other witness than the

party himself.¹ These and similar considerations have often led the courts to declare that admissions are the weakest and most unsatisfactory form of evidence.² This evidence should have little weight, if it appears that the witness testifying to the admission is careless in his mode of testifying; that he does not accurately remember the statements; that he is willing to misconstrue them, or that the declarant was misinformed, or did not clearly express his own meaning. Hence it is obvious that the degree of weight to be given to admissions depends upon the circumstances under which they were made as shown by the testimony, as well as upon the degree of accuracy and truthfulness with which they are related.³ The witness testifying to admissions or declarations should give the *precise language*, if he can; if he cannot, he should be able to state the *substance*; he should not be allowed to state his mere understanding of the legal effect.⁴ When the admission is clearly proved and shown to have been made with deliberation, it is not necessarily weak evidence, nor does it require corroboration;⁵ on the contrary, when admissions are so proved, they *may have great inherent force* as evidence.⁶

1, *Law v. Merrills*, 6 Wend. 269; *Malin v. Malin*, 1 Wend. 627; *Wallace v. Mathews*, 39 Ga. 617; 99 Am. Dec. 473 and note 480; 1 Greel. Ev. sec. 200.

2, *O'Brien v. Flynn*, 8 La. An. 307; *Tuttle v. Burroughs*,

9 La. An. 494; Printup v. Mitchell, 17 Ga. 558; 63 Am. Dec. 258; Clark v. Lartin, 9 Iowa 391; Vaughan v. Hann, 6 B. Mon. (Ky.) 338; Hornner v. Speed, 2 Pat. & H. (Va.) 616.

3, Thompson v. Thompson, 9 Ind. 323; 68 Am. Dec. 638; Chicago Ry. Co. v. Butler, 68 Ill. 409.

4, Dennis v. Chapman, 19 Ala. 29; 54 Am. Dec. 186.

5, Com. v. Galligan, 113 Mass. 202; Saveland v. Green, 40 Wis. 431.

6, Dreher v. Fitchburg, 22 Wis. 675; 99 Am. Dec. 91; Ector v. Welsh, 29 Ga. 443; Fidler v. McKinley, 21 Ill. 308; Chandler v. Schoonover, 14 Ind. 324; Ray v. Bell, 24 Ill. 444; Myers v. Baker, Hardin (Ky.) 544; Prater v. Frazier, 11 Ark. 249; Hope v. Evans, 1 Smedes & M. Ch. (Miss.) 195; Durkee v. Stringham, 8 Wis. 1; Wittick v. Keffer, 31 Ala. 199; Com. v. Knapp, 9 Pick. 496; 20 Am. Dec. 491.

§ 298. **Same, continued.** — It is hardly necessary to add that, unless admissions are contractual or unless they constitute an estoppel within some of the rules already stated, they are *not conclusive*, but are open to rebuttal or explanation, or they may be controlled by higher evidence.¹ This is true even though they are *made under oath*, although admissions thus solemnly made are evidence of great weight against the declarant, and they throw on him the burden of showing a mistake.² Admissions cannot be rebutted or explained by other statements of the declarant made at another time, for such other statements are not admissible for that purpose, unless they form part of the *res gestae*.³ *Admissions* are *not rejected* for the reason that

the declarant may have had no personal knowledge of the facts admitted,⁴ nor because made during intoxication,⁵ nor because they are drawn out by a false suggestion,⁶ nor because they may have been given under legal compulsion, as in answer to irrelevant questions or to questions which might have been objected to as incompetent,⁷ or in answer to interrogatories irregularly taken,⁸ or where there had been no opportunity to explain the answer.⁹ In all such cases the *objection goes to the weight* to be given to the admission and not to the question of competency. But admissions are not admissible if made while a party is unlawfully restrained or held in duress.¹⁰ It was so held in a case where, at the trial, the jury had been instructed to give no weight to the admissions, unless upon the whole proof before them they were satisfied that the declarations and admissions of the defendant were made, not in consequence of the unlawful detention or imprisonment, but solely from his own conviction and consciousness of their truth and with the intention on that account to give them utterance.¹¹ An admission made by a party which is *inconsistent* with his testimony goes merely to the credibility of the witness.¹²

1, Garrett v. Garrett, 27 Ala. 687; McCravey v. Remson, 19 Ala. 430; 54 Am. Dec. 194; Wakefield v. Crossman, 25 Vt. 298.

2, Rex v. Clarke, 8 T. R. 220; Thornes v. White, 1 Tyrw. & G. 110. See also, Carter v. Bennett, 4 Fla. 343.

3, Lee v. Hamilton, 3 Ala. 529; Roberts v. Trawick, 22 Ala. 490; Hunt v. Roylance, 11 Cush. 117; 59 Am. Dec. 140; Clark v. Huffaker, 26 Mo. 264; Tucker v. Frederick, 28 Mo. 574; 75 Am. Dec. 139; McPeake v. Hutchinson, 5 Serg. & R. (Pa.) 295; Snowden v. Pope, Rice Eq. (S. C.) 174; Davis v. Kirksey, 2 Rich. L. (S. C.) 176; Jones v. State, 13 Tex. 168; 62 Am. Dec. 550.

4, Sparr v. Wellman, 11 Mo. 230; Kitchen v. Robbins, 29 Ga. 713.

5, State v. Bryan, 74 N. C. 351.

6, Higgins v. Dallinger, 22 Mo. 397.

7, Grant v. Jackson, Peake 203; Ashmore v. Hardy, 7 Car. & P. 501; Smith v. Beadnell, 1 Camp. 30.

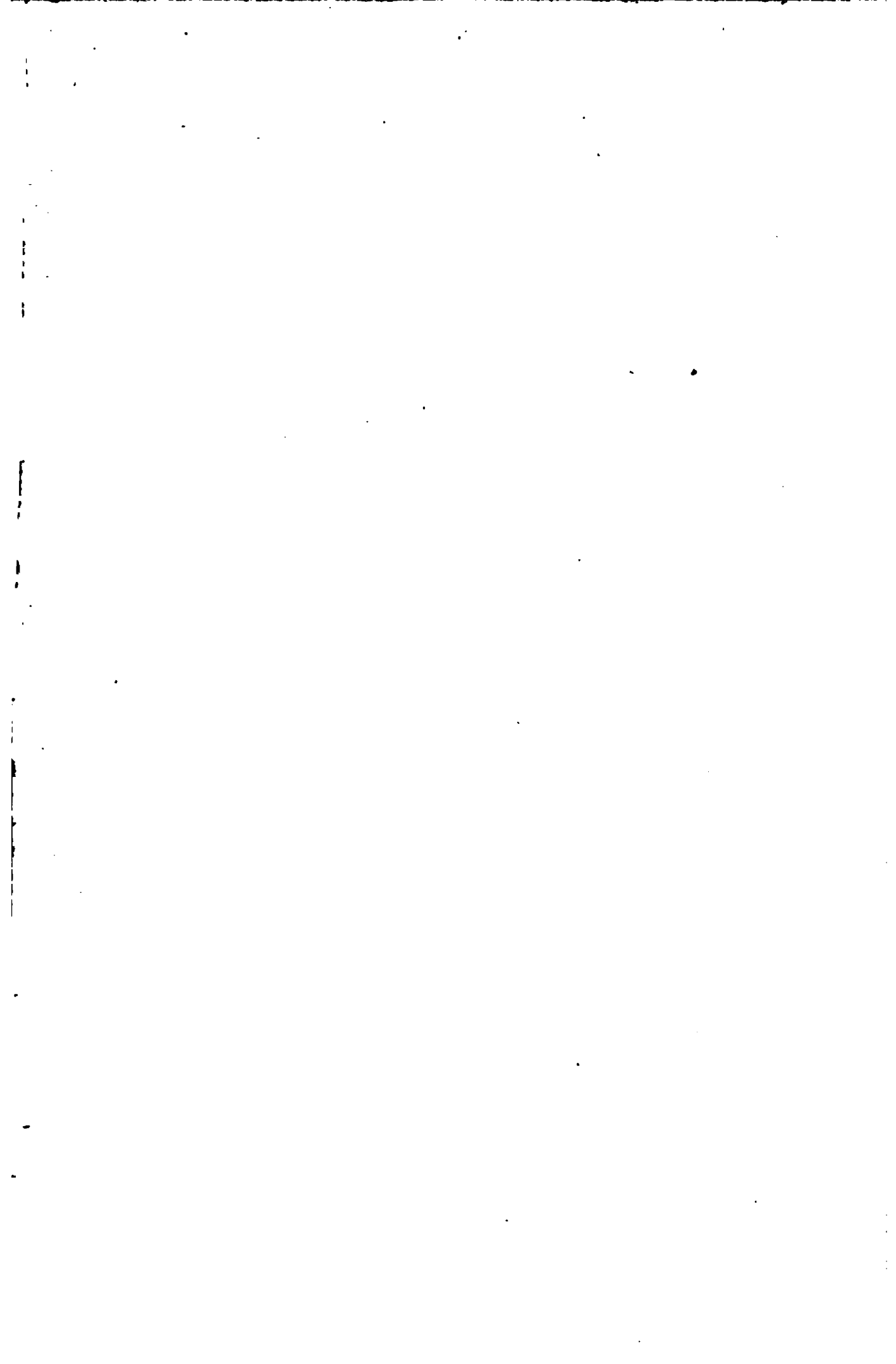
8, Edwards v. Norton, 55 Tex. 405.

9, Collett v. Keith, 4 Esp. 212.

10, Stockfleth v. De Tastet, 4 Camp. 11; Robson v. Alexander, 1 Moore & P. 448.

11, Tilley v. Damon, 11 Cush. 247.

12, Eastman v. Lake Shore & M. S. Ry. Co., 101 Mich. 597.



2.

